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Environmental Law in the Political Ecosystem - Coping with the Reality of Politics

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**Eighth Annual Lloyd K. Garrison Lecture
on Environmental Law**

**Environmental Law in the Political
Ecosystem — Coping With The
Reality of Politics**

ZYGMUNT J.B. PLATER*

Humans are animals that are political.
Aristotle†

I. Introduction: A Caveat and a Political Proposition

Caveat: Much of the following disquisition is based upon a legal war story, with all the dangers that implies. The kind people who invited me to present this year's Garrison Lecture were warned that I would be deeply enmeshed this sabbatical year in the project of finally writing, after twenty-plus years, a book about an endangered species case in which my students and I, for six years in the 1970s, had the privilege and frustrating burden of repre-

* Professor of Law, Boston College Law School; J.D. Yale Law School; S.J.D. University of Michigan Law School; A.B. Princeton University. I am grateful to my colleagues at Pace University Law School for their invitation to deliver this Garrison Lecture essay, and delighted to have been able to sneak into the lineup of such an eminent assemblage of predecessors. Thanks to David Cole, Justin Surber and Jeremy McDiarmid for assistance on resources and citations. All errors are mine.

† Aristotle, *The POLITIKA*, or *POLITICS*, Book 1 Part 2 (BC 350), paraphrased, without legitimate expertise, in order to achieve freshened context and gender neutrality. But compare the alternative paraphrase of this Aristotelian epigram *infra* at p.487.

senting a two-and-a-half inch fish. The case is *Tennessee Valley Authority v. Hill et al.*¹ which pitted the Tennessee Valley Authority's final dam, the Tellico Dam on the Little Tennessee River, against a diminutive endangered fish, the snail darter.

But the snail darter case apparently has assumed something of the character of a classic. In a recent national on-line poll of environmental law professors seeking a consensus on America's ten most significant environmental protection court decisions, *TVA v. Hill* was ranked number one, receiving almost twice as many votes as the runners-up.² More than any case I know of, it serves as a figurative microtome³—an analytical slice of life presenting hundreds of individuals and dozens of legal and governmental institutions in interesting and revealing ways. It taught me and my students a great deal during the years we carried it on, and continues to teach us as we look back at it. Fortunately—although ultimately we lost the fight, the ill-considered dam was built and the darter's river valley habitat that was a national treasure is forever lost—the fish still lives on today in several transplanted populations as a merely “threatened” species. Less fortunately, and in part ironically because the fish survived, the name of the fish is still invoked as an example of grossly misguided, extremist, unnecessary, and illegitimate environmental regulation.

The snail darter controversy serves as a useful political case study because it reverberates with stark political overtones as well as legal meaning. The case—often depicted, even by environ-

1. 437 U.S. 153 (1978), *aff'd* 549 F.2d 1064 (6th Cir. 1977) *rev'd* 419 F. Supp. 753 (E.D. Tenn. 1976), (hereinafter *TVA v. Hill*). As noted here in the text and later, I was privileged to be petitioner and attorney in the snail darter case over six years in the courts up through the Supreme Court, in the agencies, and in its legislative process. An illustrated slideshow and background account of the endangered fish-dam litigation is available online at <http://www.law.mercer.edu/elaw/zygplater.html>, and is drawn upon in parts of this essay. (Copy on file with Pace Environmental Law Review.)

2. See Posting of James Salzman, salzman@wcl.american.edu, to envlawprofs@darkwing.uoregon.edu (Oct. 26, 2001) (copy on file with Pace Environmental Law Review). The second-ranked nominations were *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976). It should be emphasized that the polling ranked the *judicial decisions*, not necessarily the efforts of the attorneys who argued them.

3. A microtome is a scientific instrument that shaves thin slices of material from sampled objects in order to make laboratory slides that can be viewed through a microscope, revealing the objects' fundamental components, structures, and internal processes.

mentalists,⁴ as *The Most Extreme Environmental Case There Ever Was*—has been nationally notorious almost from the start of the litigation in 1974. Twenty years later the snail darter resurfaces regularly in news commentary and editorials, congressional floor speeches,⁵ and Rush Limbaugh's diatribes against environmentalism.⁶ Moreover, because the merits of the fish/dam

4. See, e.g., John Marks, *Special Report: The Return of the Kennedys: Struggling Against Conservatives and Cynics, A New Generation of Activists Tries to Assert Itself*, U.S. NEWS & WORLD REP., Sept. 2, 1996, at 42.

5. 143 Cong. Rec. S9411, (daily ed. Sep. 16, 1997) (statement of Sen. Chafee) ("Controversy has surrounded the law, however, since its passage. In the mid 1970's, the law became ensnared in a bitter fight over the construction of the \$900 million [sic] Tellico Dam and the dam's impacts on the hapless snail darter."); 142 CONG. REC. H10501-01 (daily ed. Sept. 17, 1996) (Tribute to the Honorable James H. Quillen on his retirement from Congress) ("And Jim [was] persuaded that the fish could get along just as well whether the dam was there or not"); 141 CONG. REC. S6423-02 (daily ed. May 10, 1995) (statement of Sen. Packwood) ("We do not care if the snail darter disappears"); 137 CONG. REC. S7848-01 (daily ed. June 13, 1991) (statement of Sen. Johnston) ("Ask hardworking voters to sacrifice in the name of the snail darter, and, if they are feeling polite, they will give you a shrug"); 136 CONG. REC. H7508-06 (daily ed. Sept. 13, 1990) (statement of Rep. Delay) ("Because the rabid environmentalists felt it was more important to jeopardize the lives of our brave American serviceman than risk the death of a single snail darter.").

6. "America today is a new homosocialism, communism. What these people are is against private property rights. They are trying to attack capitalism and corporate America in the form of going after timber companies. And they're trying to say that we must preserve these virgin trees because the spotted owl and the rat kangaroo and whatever live in them, and it's the only place they can live, the snail darter and whatever it is." Rush Limbaugh, *The Rush Limbaugh Show* (Infinity radio broadcast, Dec. 7, 1993).

The snail darter case has likewise been used as an example of nonsensical litigation in a much more Olympian setting by one of our most prominent savants of jurisprudence. In *LAW'S EMPIRE*, my old professor Ronald Dworkin gets virtually all the facts of the case wrong, then bitterly criticizes Chief Justice Burger's decision for enforcing the statute on its terms and refusing to allow the district judge or the Justices to do what Professor Dworkin thinks preferable: to forge judicial adjustments to statutes to effectuate what the judge or Justices believe to make better sense. Here too the snail darter may serve as a canary, warning us of the dicey legal process hazards lying within the coal mine of Professor Dworkin's propositions. See Ronald D. Dworkin, *LAW'S EMPIRE* 20-23, 314-354 (1988).

In March of 2002, the keywords "snail darter" brought up 256 hits in a Lexis-Nexis search of press articles from around the nation over the past two years—most often pejorative references to the fish and its environmentalist friends. See, e.g., Patrick Buchanan, *On the Record with Greta Van Susteren*, (Fox television broadcast, Feb. 8, 2002), Transcript # 020805cb.260 ("If the snail darter is a species that's dying out, people are concerned . . . [w]hy would they not be concerned that European peoples who have created the greatest civilization in history, are dying out and will be a tiny fraction of two percent or three percent of the world's population by the end of this century?"); John Guffey, Editorial, *SUNDAY OKLAHOMAN*, Jan. 27, 2002 ("Of course, birds, snail darters and other assorted wildlife are worth more than human beings in our distorted minds."); *Hold Your Breath, Suckers*, *ECONOMIST*, Feb. 9, 2002 ("Farmers, industrialists and conservatives fume that the ESA has become a way for

juxtaposition continue to be understood 180 degrees backward even by most environmentalists, it seems worthy of a retrospective look.

Proposition: In this essay, the proposition I want to draw from the narrative of the endangered species litigation is derivatively Aristotelian—that we must consciously, actively, and explicitly integrate an informed consideration of human politics into what we teach and do in environmental law. The proposition is not that we should steep ourselves in party politics, although there are interesting observations aplenty that could be made on the direct consequences that the two major parties (and occasionally their wistful smaller incarnations) have on the evolution of environmental law. Nor do I want to address Bush Jr.-Cheney or Clinton-Gore politics, nor Reagan-Bush Sr. or Carter-Mondale politics, although there are interesting views and consequences there, too. Nor politics within the judicial process, because that is a phenomenon that we professors already know how to discuss with our students.

Rather I'd like to explore some political realities in the administrative and legislative process that my students and I learned for the first time from our intense experience of our particular case, realities that may well be familiar to most of this audience but nevertheless deserve explicit acknowledgment and thought about how we teach and use them.

The proposition offered here operates at two different levels:

- *practical politics*—it is essential to us as legal educators that we explicitly acknowledge and help our students understand the structures, contexts, and maneuverings of politics in the daily practice of environmental law—because many law students have only a naïve eighth grade civics book comprehension, or less, of how the governmental and human systems they are entering really work,

and further, by extension,

- *political overview*—that inevitably we should define for ourselves, and help our students define for themselves, some *overall* schematic political constructs, some ways to picture the structures of societal governance, so that we and they can have a working personal and professional sense of where

environmentalists to enlist such previously obscure creatures as the spotted owl and the snail darter in anti-business campaigns.”).

environmental law and lawyers fit within the overall scheme.

This proposition, especially in its latter portion, risks the criticism that it is just a mite grandiose. But it reflects the fact that most of us in this field believe environmental law is different from other fields of law. It is a jurisprudence that pegs its operational daily standards and processes not only on the present moment—on this fiscal year, or this Administration, or this decade, or on the lifetime of any individual—but on the long term quality and sustainability of human life within the richly interconnected complexity of all the other systems that make up our Spaceship Earth.⁷ And in terms of human governance, most of us in this field have repeatedly discovered that, if you scratch away at the surface of almost any issue or controversy in environmental law, pretty soon you will be looking at some of the very most fundamental questions of democratic government.

Environmental law has long played the role of the little kid pointing to the Emperor's bare tush that no one dare mention. We force power players to acknowledge the reality that acid rain and global warming truly exist, that the Mineral Leasing Act of 1872 continues to be a scandalous giveaway, that nonpoint sources of water pollution and secondary National Ambient Air Quality Standards (NAAQS) are important but evaded, that chlorinated hydrocarbons do not simply disappear but instead travel far in the atmosphere and in our own bodies' hormone systems,⁸ and so on. But it is useful to identify our own speak-not. In our own reluctance to acknowledge the ubiquitousness of politics we too are emperors. In the present generation of environmental law, whatever it is,⁹ we are excruciatingly hesitant to acknowledge that an explicit exegesis of political factors and forces is a necessary part of virtually all environmental law analyses, part of how we frame

7. "We travel together, passengers on a little spaceship, dependent on its vulnerable resources of air and soil, all committed for our safety to its security and peace, preserved from annihilation only by the care, the work, and, I will say, the love we give our fragile craft." Adlai Stevenson, Address at the United Nations, 1965.

8. THEO COLBORN ET AL., *OUR STOLEN FUTURE: ARE WE THREATENING OUR FERTILITY, INTELLIGENCE, AND SURVIVAL?—A SCIENTIFIC DETECTIVE STORY* (Plume 1997).

9. Is this the third generation of environmental law, or the fourth, or fifth? (Does a wistful period of alleged collaborative trusting partnerships between government and industry—perhaps ended by Enron, Global Crossing, Tyco, and WorldCom—count as a generation of environmental law?)

our own environmental law work,¹⁰ although most of us do not teach our students how to scope or cope with politics.

II. Practical Politics: A Little Fish Goes to Washington

TVA v. Hill was in effect the final act in a long running history of conflict between an adamant federal public works agency that wanted to build one more dam and a remarkably persistent evolving coalition of citizens who fought bitterly to save the river and its valley.¹¹

Ironically, framing the story is the fact that it is now clear the citizens were overwhelmingly correct about the merits of the conflict from the very beginning, while the agency was terribly wrong. This is not just the sour-grapes assertion of an erstwhile advocate. On the objective record at the end, the TVA's Tellico Dam project was a stark public policy mistake, measured in straight economic

10. In a recent series of discussions with colleagues in Oregon I focused on the fact that virtually all public interest litigation must operate simultaneously on two tracks—on the strictly legal process involved in courts and agencies, and on the concurrent track of public opinion and legislative politics that lies beyond the courts. It is the latter track, where the Press is so important, that ultimately determines final outcomes on the ground (or in the air, water, and living systems) in so many of our environmental law cases. See generally Zygmunt J.B. Plater, *Law and the Fourth Estate: Endangered Nature, the Press, and the Dickey Game of Democratic Governance*, 32 ENVTL. L. 1 (2002). This essay adds to that a recognition of practical politics within the legal process itself, particularly in dealing with federal agencies and the machinery of congressional politics. And behind that lies grander political terrain

11. A thumbnail chronology:

- 1959 Red Wagner, Chair of TVA, tells his agency to develop an economic development rationale to build a 69th TVA dam, on the last 33 miles of the Little Tennessee River; planners' brainstorming leads to Timberlake Model City plan to be built on shores of a new reservoir.
- 1968 Tellico Project funding begins, with a \$65 million budget; Dam itself is built: a \$4 million concrete structure astride the south channel of the Little Tennessee River; land acquisition.
- 1971-72 TVA declines to do an EIS; but a NEPA injunction forces halt.
- 1973 NEPA injunction dissolved, but snail darter is discovered.
- 1974 Hank Hill needs a term paper topic; dam opponents line up behind the darter; TVA re-starts construction and accelerates land clearance.
- 1975 Listing the darter as an official endangered species & listing of critical habitat.
- 1976 Trial; citizen attempts to get Interior to enforce Act.
- 1977 Sixth Circuit rules for darter; issues injunction.
- 1978 Supreme Court hears case and affirms injunction, 6-3.
- 1979 January, God Squad unanimously upholds injunction on economic grounds; *but* September, an appropriations rider overrides the injunction; Jimmy Carter woefully signs the bill.
- 1980 River is gone; darter's natural population is terminated, although transplants survive.

terms as well as the less tangible rubrics of social, ecological and aesthetic concerns.¹² It destroyed major public economic values that greatly exceeded the project's actual economic benefits, and the benefits produced were far less than would have been produced by non-dam development alternatives repeatedly proposed by the citizen environmentalists, alternatives consistent with conserving the little fish.¹³

Scope out protagonist agencies: they are human too. Twenty-five years after its founding, TVA, the New Deal's brightest rose, had lost momentum and suffered low morale. Founded in the late 1930s, TVA's original missions were to make fertilizer and electrical power. Understandably, TVA chose to focus on power, and in

12. The easiest way to establish the actual merits of the Tellico Project is to review the unanimous decision of the unique Cabinet-level review forum created especially to analyze the competing merits of the Tellico Dam after our Supreme Court victory. At that point, in December 1978 when the project was ninety-five percent complete, an intensive staff economic analysis, basically ignoring all the environmental, historical, and cultural values that weighed against the dam, led the Cabinet members and other appointees on the first Endangered Species Committee or "God Squad" as it was called, to decide unanimously that TVA's project had never made sense. As Charles Schultze, the Chairman of the President's Council of Economic Advisors and a member of the Committee declared, "The interesting phenomenon is that here is a project that is 95% complete, and if one takes *just the cost of finishing it* against the [total] benefits, and does it properly, *it doesn't pay!* Which says something about the original design!" *Endangered Species Committee, Tellico Dam and Reservoir Project* 25-26 (Jan. 23, 1979) (unpublished transcript of public hearing) (emphasis added) (copy on file with Pace Environmental Law Review). See also text at footnote 56 *infra*.

13. The citizens' proposed alternative development plan for the valley included tourist routes to the National Park, return of agricultural land to dispossessed farmers, industrial sites in two industrial parks (of greater capacity than TVA's plan because low-lying lands would not be flooded), and residential and commercial development. With a major north-south interstate, I-75, and a major east-west interstate, I-40, within six miles of the valley, a significant number of the National Park's annual ten million visitors could access the Park through the valley's historic sites. If this entry region was designed and developed to coordinate with the Park, as it could because TVA already owned enough land, the valley could continue to be a prime agricultural community, interspersed with tourist facilities for camping, horseback riding, float trips and exploring historical features like the forts, Indian towns, and Paleolithic archaeological sites (as even Ohio has done with its archaeological sites, with so much less to build on). The alternative development options were prepared by the citizens in cooperation with the University of Tennessee School of Architecture, but never were mentioned by TVA nor covered by the local press.

Since the completion of the dam and the flooding of the reservoir, the Tellico Project has become primarily a second-home development project for wealthy retirees, on land transferred on advantageous terms to a development corporation owned in part by Walmart's Sam Walton. The industrial park has attracted a number of industries, but none for which this reservoir was necessary. The farmers were unable to repurchase their condemned lands and now can go onto their old properties only in the capacity of servants or employees.

its first years rapidly became a world-famous dam-building agency. But by 1948 TVA had built three dozen dams, using up virtually all the major river sites that would generate substantial power for the system.¹⁴ But it is hard for agencies as well as individuals to give up noble self-images. In bureaucracies, moreover, it turns out that once you get going, "a rolling stone gathers momentum." So the agency kept on building dams, smaller and smaller, most of them based on shaky benefit-cost justifications. By 1962 the agency had more than 65 dams, with 2500 linear miles of river turned into a chain of sluggish impoundments descending to the Mississippi. Tennessee now contains more shoreline than all the Great Lakes combined.¹⁵

TVA wanted to keep alive the self-image and public sense of its bright progressive mission instead of settling into an identity as just another corpulent utility company. And what better cameo than the classic mental image of a dam?—bold men placing big chunks of concrete to block and conquer the forces of nature, backing up a river into swollen captivity under human control, and releasing it according to engineering whim in frothy spillways, their spray throwing rainbows to the sky.

After building more than five dozen dams, however, TVA had run out of places where another traditional dam could be justified. The agency had shifted ninety percent of its energy production to coal and nukes and was indeed becoming just another utility. But in a decisive turnaround meeting held at his Watts Bar Dam conference center in 1959, Aubrey "Red" Wagner, the agency's general manager and later chairman, resurrected the agency's spirits by launching a new initiative that might let them build more dams. Starting with a dam to impound the last thirty-three miles of flowing river left in the Little Tennessee River, the Tellico Dam, TVA would define a new mission and justify its continued existence by commencing a new series of "regional economic demon-

14. The agency began to shift its mode of power production so that by the 1970s, ninety percent of TVA's power was being generated by nuclear and coal-burning steam plants.

15. The Great Lakes contain 7870 miles of shoreline. 10 *ENCYCLOPEDIA BRITANICA*. *The Great Lakes* 774 (1973 ed.), cited in Zygmunt J. B. Plater, *Reflected in a River: Agency Accountability and the TVA Tellico Dam Case*, 49 *TENN. L. REV.* 747 (1973). The total shoreline of TVA reservoirs within Tennessee is roughly 10,000 in summertime. Telephone interview with TVA Public Information Office (Sept. 3, 1982).

stration" projects.¹⁶ The Tellico Project became an obsession for Chairman Wagner, and by extension for the entire agency he dominated. Wagner engineered an intensive internal mobilization of TVA's forces, driving the Tellico Dam to completion despite its lack of normal water project purposes and despite its violations of environmental law.

To understand the merits of the \$160 million Tellico Dam project you have to start with the bemusing fact that most of that sum was for land purchase and development. The project's primary avowed purpose besides recreation was to create a base for a model industrial city to be called "Timberlake New Town" that the agency said would require a reservoir. At a cost of \$850 million—most of it not included in the Tellico Dam accounting, including at least \$145 million in additional "infrastructure grant" subsidies that Congress would be asked to provide at some later date—TVA and its partner, the Boeing Corporation, said their hypothetical Timberlake City would bring 50,000 people and 26,000 new jobs to the area.¹⁷ The "shoreland development" benefits of this plan, along with even greater hypothesized recreational benefits, al-

16. The internal agency story is told in a book written from TVA archives, WILLIAM BRUCE WHEELER & MICHAEL J. McDONALD, *TVA AND THE TELLICO DAM, 1936-1979: A BUREAUCRATIC CRISIS IN POST-INDUSTRIAL AMERICA* (1986), and a case study, STEPHEN J. RECHICHAR & MICHAEL R. FITZGERALD, *THE CONSEQUENCES OF ADMINISTRATIVE DECISION: TVA'S ECONOMIC DEVELOPMENT MISSION AND INTRAGOVERNMENT REGULATION* (1983). These two books are excellent sources of background data on the history and merits of the controversy and TVA's adamancy in pushing the dam in the face of the law and critical analysis on the merits.

The TVA can self-authorize projects if they fit its charter, and Wagner was seizing upon Section 22 of the TVA Act which authorizes "the proper use, conservation, and development of the natural resources of the Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this chapter . . ." TVA Act § 22, 16 U.S.C. § 831u (1994) (original version at ch. 32, § 22, 48 Stat. 69 (1933)).

17. TVA planners hypothesized the Timberlake model city following the design of a utopian city conceived by Athelstan Spilhaus in the 1940s that likewise was never built. See TVA, Tennessee Valley Authority Environmental Statement: Timberlake New Community I-1-32 (Jan. 9, 1976). TVA asserted, with no empirical data, that its model city would need a reservoir, hypothesizing that it would best develop if it had a barge channel in addition to the already-existing existing railroad and interstate highway facilities. Swatara, Minnesota, also considered building a Spilhaus utopia in the form of a 20,000-acre domed city, which, after approximately \$1.5 million in private and public money spent on planning throughout the 1960s and early 1970s, was finally defeated in the 1973 Minnesota legislature due to stiff opposition and budgetary constraints. *Once a Dead and Buried Idea, a Futuristic Domed City Shows Signs of Life*, CHI. TRIB., Jan. 27, 1987, at 3C. TVA planners named the hypothetical city "Timberlake" after Lt. Henry Timberlake of George III's colonial army who visited the valley and produced the first map of the area in 1762.

lowed TVA to claim a 1.70/1.00 benefit-cost ratio (later modified downward).¹⁸ Because Tellico was such a marginal site, the dam would have no generators, and traditional water project benefits were minimal—small potential increments in barge navigation, water supply, power enhancement,¹⁹ and flood control. TVA condemned more than twice as much land to give to Boeing and sell to developers than to impound with a reservoir—more than 38,000 acres taken from more than 340 farm families, with only 12,000 acres to be flooded.²⁰ Only about twenty-nine percent of the project lands would be covered by the reservoir. Despite the inevitable image of the controversy, the Tellico project was fundamentally not a hydroelectric dam project. The dam was just the dubious central feature of a federal recreation and land-development project.²¹

18. Under Senate Document No. 97, 87th Cong., 2d Sess. (1964), every federal agency, when spending tax payer dollars, had to have a theoretically profitable benefit-cost ratio—for every taxpayer dollar spent, the proposed project has to be able to claim to earn at least \$1.01 over 100 years. Beyond hyperbolic benefit projections, agency planners were helped in projecting their positive ratios by the fact that they could treat the cost of taxpayer dollars as interest-free, or nearly so.

The official Benefit-Cost ration as of the 1972 environmental impact statement:

DIRECT ANNUAL BENEFITS:

Flood control	\$505,000
Navigation	400,000
Power	400,000
Recreation	1,440,000
Fish & wildlife	220,000
Water supply	70,000
Shoreline development	714,000
Redevelopment	15,000
<i>Total Direct Annual Benefits:</i>	<i>\$3,760,000</i>

DIRECT ANNUAL COSTS:

Interest and amortization	\$2,045,000
Operation & maintenance	205,000
<i>Total Annual Costs:</i>	<i>\$2,250,000</i>
Benefit-Cost Ratio (later downgraded):	1.7: 1.

From TVA, TELLICO DAM PROJECT EIS I-1-49 (1972).

19. Tellico had no generators but could redirect flows through a canal to an adjacent dam, generating circa twenty-four megawatts of power. To put this in perspective, TVA's existing system contained more than 22,000 megawatts capacity, and an economist figured that the valley lands, if their annual biomass production was merely burned in a steam plant, would produce more power than a dam, netting thirty-five megawatts.

20. Under the agency's special juryless condemnation procedures the farmlands could be taken for an average of less than \$400 an acre. Zygmunt J. B. Plater, *Reflected in a River: Agency Accountability and the TVA Tellico Dam Case*, 49 TENN L. REV. 747, 759 n.37 (1973).

21. It was never seriously questioned within TVA why an economic development project required a dam. Institutionally it was well understood that the opportunity to

The resources that the dam project would eliminate, on the other hand, were extraordinary. The broad valley of the Little Tennessee River where it flows out of the Great Smoky Mountains had been an especially rich natural place for millennia. Archaeological digs along the river revealed the oldest continuous human habitation sites in all of North America, more than 10,000 years of human history. The River's waters ran cool, highly oxygenated, fertile, and filled with fish. The valley lands were rich beyond belief, high-grade topsoil to a depth of twenty feet or more. The Cherokees' central towns, their most sacred places, and Chota, their holy city of refuge, were located here on the riverbank. The first Anglo colonists entered the valley in the 18th century, building a log fort, Fort Loudon, as their southwestern-most redoubt protecting them and their Cherokee allies against the French and other Indian tribes. After Andrew Jackson drove the Cherokees out of the valley, white settlers moved in to take over the vacated Cherokee lands. Many of those early families and old Fort Loudon were still there in the valley 200 years later when TVA decided to build Tellico Dam.²² The agricultural land along the river was home to more than 350 family farms, with 15,500 acres of the rich-

build another dam was the central motivation for the project and an essential part of the reinvigoration of internal agency morale. WHEELER & McDONALD, *supra* note 16, at 3-33. TVA's most constantly voiced justification for insisting on a dam and reservoir was the so-called "Foster Hypothesis." In conversations with lower-level TVA staffers in the 1970s the author was repeatedly told of the internal importance of the "Foster Hypothesis," which underpinned the rosy economic projections for Timberlake by asserting that industry would be drawn to a site so closely accessible to three different modes of transportation—in this case, two interstate highways, a railroad line, and a barge channel. They indicated that this functional hypothesis was not based on empirical data but on Foster's executive intuition. Minnard "Mike" Foster, TVA's director of navigation and regional development planning, regularly repeated his intuitive assertion, incorporated into the agency's official benefit-cost calculations, that corporate investment would be drawn to Timberlake New Town by the particular transportation combination, at the Tellico Project's midpoint, of a railroad line, interstate highway access, and a barge terminus. See TELLICO DAM AND RESERVOIR, STAFF REPORT TO THE ENDANGERED SPECIES COMMITTEE (Jan. 19, 1979). The latter required a Tellico reservoir and canal. As it happened, the barge terminal lies choked in weeds, and appears today, after twenty years, to have been used only once, by a TVA dredging barge.

22. As early as 1894, Cyrus Thomas of the Bureau of Ethnology, a branch of the Smithsonian Institution, observed, "The valley of the Little Tennessee River from where it leaves the Smoky [M]ountains which form the boundary between North Carolina and Tennessee, to where it joins the Tennessee River in Loudon County, is undoubtedly the most interesting archeological section in the entire Appalachian district." *Endangered Species—Part 2: Hearing on H.R. 10833 Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 668 (1978) (exhibit taken from National Register of Historic Places).

est earth in the nation, USDA Class One and Two soils, virtually all of which would be eliminated by the reservoir.

Environmental analysis should seek to make economic sense—benefits, costs, and alternatives. The project's environmental opponents determined early that they would have to do more than merely oppose the dam and reservoir. Instead, as so often occurs in environmental cases, to have a realistic chance of prevailing in the long run they had to base their position on a comprehensive conceptual benefit-cost-alternatives accounting. On one hand the Tellico citizens group reviewed the purported benefits of the reservoir—recreation, an uncertain model city's industrial development on condemned lands, and minor claimed benefits in water supply, flood control, and hydroelectric capacity—and found them on the objective record to be quite insubstantial. Viewed in businesslike terms, the dam project was an economic basket case. They then looked at the purported costs of the project, arguing that the true costs extended beyond the Authority's costs for cement, fill dirt, land condemnation, and roads and bridges. A realistic accounting of the true social costs would have to include the loss of all the special qualities of the river valley that had made it a treasure over the centuries. The river was a major recreational resource on its own terms, even before it had been rendered a virtually unique resource by the impoundment of 2500 linear miles of river in the surrounding region. The agricultural soils of the valley were of great economic value, the historic resources held great public value in their own right and could be capitalized monetarily in a tourist-based development if the valley's central portion was not flooded, and a major parcel of upriver project lands had particular potential for use as an access and overflow management area for the Great Smoky Mountains National Park. The citizens' benefit-cost accounting thus included extensive consideration of development alternatives.

With increasing sophistication over the years the citizens argued for a comprehensive river-based development project, allowing displaced families to go back onto most of the rich agricultural lands of the valley, developing a tourist highway through the valley to the Park, developing recreation to promote canoe float trips and other water-based sports, improving access to the superb trout fishing resource, and providing for two industrial parks along the river at locations where they would not disturb the other qualities of the valley. And over the years the citizens' analysis of the project consistently proved more accurate

than the TVA's projections in every expert review that took place during the course of the controversy.

Dogging the citizens' steps from the start, however, was the fundamental fact that we were missing the point. With the Tellico Dam, as with many environmentally destructive projects and programs, environmental activists have felt obliged to address the purported public purposes of the project and attempt to refute them, presenting alternatives that would better achieve the agency's purported economic objectives. But the true objectives motivating the project internally and within the water project establishment in Washington were not its alleged public purposes, but rather internal institutional drives to keep agency morale and momentum rolling, to win federal appropriations, and to build local and national political capital.²³

Early in the process we tried to persuade contacts within TVA to get the agency to enter into mediation with us on Tellico. At the time Chief Justice Burger was prodding attorneys to seek negotiated win-win conflict resolutions outside the crowded courts. But our main contact inside TVA told me, "It will never happen. Red Wagner and his boys will never go into a mediation where all the facts and alternatives are laid out on the table. If they did, the rational conclusion would be all too obvious—some kind of development plan without a dam. But my bosses think they'll beat you if they can play their own game." Why did the leadership react so strongly against considering our alternative vision for the valley? "Look, Zyg, it's *male menopause*. These guys came down here as young reformers, a lot of them from Cambridge. They came here to lift a primitive region out of its backwardness. Now thirty years later when some of the locals start to have their own ideas about how the region should be developed, these guys get hot flashes. The children are bucking their betters. The leadership can't abide the thought that you might win." It was clear, he said, once TVA had decided what was best for the valley and for the agency itself, it would brook no opposition.

Our attempts to refute the project on its claimed rationales were indeed missing the point. Underlying internal institutional political reasons were carrying the project onward without regard to its actual public economics or logic. Only by forcing transparency, bringing the debate out into a publicly visible analytical

23. See generally WILLIAM ASHWORTH, *UNDER THE INFLUENCE: CONGRESS, LOBBIES, AND THE AMERICAN PORK BARREL SYSTEM* (1981).

forum where civic public merits can predominate, could we hope to sidestep the power of the insider establishment that did not care about those merits.

Citizen statutory enforcement can create a governmental forum where none exists. The problem the citizens faced is that in our legal system there is no established forum in which public interest advocate outsiders can reliably trigger official analytical scrutiny, no way to obtain an accounting, even if on its merits a project is demonstrably irrational and destructive. There is no entity within the administrative and legislative processes that reliably provides a roving commission seeking out ongoing agency or economic initiatives that need review.²⁴ Courts for their part likewise do not willingly take on the role of project and program scrutiny.

But it may be different where citizens can find and prove a substantive statutory violation in court, forcing the other branches of government to take account of the larger questions. Without an endangered fish, the American system of governance provided no mechanism for addressing and rectifying the ongoing mistakes of the Tellico Dam. With a fish, the dam ultimately got the highest-level economic review in the history of the American pork barrel system.

In October 1974, second-year law student Hank Hill (yes, that *Hill*) walked into his environmental law professor's office and told how his grad student buddies' ichthyology professor had just found a small, hitherto-unknown perch, an endangered species, on a large set of shoals at Coytee Springs smack in the middle of the Tellico project, a fish that apparently existed only here because it had been extirpated in every other big river habitat in the Southeast by dams. "Do you think that is enough of a topic for a ten-page term paper?" I said I thought it would be.

At a hastily called meeting at Old Fort Loudon the next Saturday night, a contingent of us from the University of Tennessee College of Law asked the farmers and other local citizens who had lost an earlier National Environmental Policy Act (NEPA) fight²⁵ whether they wanted to fight the dam once more. Should the bat-

24. Senator Proxmire used to issue annual Golden Fleece Awards to projects and programs he identified as wasteful, but that maverick process was scarcely a "forum" for review, and the good Senator and his awards are no longer with us.

25. *Env'tl. Def. Fund v. TVA*, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974).

tered little coalition pull together and try once more, using the Endangered Species Act (ESA)?

The facts and the law seemed clear, we said. If you parsed Section 7 of the ESA of 1973 carefully, there were at least two causes of action hidden within its verbal foliage. Eliding the italicized words that follow, once we got the species and its critical habitat listed, we could assert two separate violations:

INTERAGENCY COOPERATION

The Secretary [of Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. *All other federal departments and agencies shall* in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter while carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title, and by taking such actions necessary to *insure that any actions* authorized, funded, or carried out by them *do not jeopardize the continued existence of any endangered or threatened species or result in the destruction or modification of habitat* of any species which is *determined* by the Secretary, after consultation as appropriate with the affected States, to be *critical*.²⁶

The dam would eliminate the entire known population of darters, and destroy their critical habitat. The statute was violated and so an injunction should issue. Asa McCall, old and grizzled, who for months had been holding off the TVA condemnation marshals with his dog and his shotgun and the presence of a news photographer, looked around the room and said, "I've never before heard of this little fish, but if it can save our farms, I say let's give it a try." He passed his hat around the room and the \$29 collected in it that night was the seed money for the snail darter campaign.

Before commencing the legal process, however, we called Joe Sax asking his advice. Citizen enforcement actions can be critically useful civic initiatives, but can also be crude unguided missiles that backfire, blow up, hit the wrong targets, or for a host of other reasons should never have been launched in the first place. Should we launch a case that would obviously be so open to ridicule, especially at first impression, potentially undercutting the ESA itself and by extension giving anti-regulationists a political

26. 16 U.S.C. § 1536 (as it stood in 1973) (emphasis added).

tool against all environmental laws? When he heard about the economics and common sense of the case, however, Sax said, "Sounds reasonable to me. I'd say try it." So, from the beginning, the campaign was Saxist: The citizen litigation aimed to get a statutory enforcement injunction, which would shift the matter to Congress to resolve the impasse—a "remand to the legislature"²⁷ where the facts of the case could finally be seen and analyzed in a public forum and the case resolved upon the real public merits.

Let us observe the politics within the case as it progressed, viewing politics here in the context of people, structures, and tendencies.

Localism. Note that it was important from the beginning that the citizen group enforcing the ESA against the Tellico Dam was deeply based within the locality. Localism is a dominant consideration in most environmental controversies. It just would not have worked to have this case launched and carried on by a handful of people based in the university wearing Earth Shoes and turtle-neck sweaters. It was practically and politically essential that the coalition included farmers who were defending their homes and land, Cherokee Indians who had an ancestral tie to the place, and a variety of people who were well known in the locality as personally invested and committed to the valley and the river. Without them the venture could have been dismissed as doubly superficial—an insignificant fish represented by élitists with no significant linkage to the place or the controversy—and thus politically illegitimate.

The legal chronology of the case moved through three stages: The official listing of the species, statutory enforcement in court, and the defense of the statutory injunction and the Act against political backlash. Without the official listing of the species and its critical habitat nothing else in the legal process would follow. Once the species was listed, the question was whether the statute would be enforced against the Tellico Dam, and by whom? And after the injunction was issued, how would it be defended in the political process against a powerful and foreseeable backlash?

27. Ultimately Professor Sax's concept of "remand to the legislature" was cited in our Supreme Court brief and may well have been the argument that swung Chief Justice Burger's vote. "[T]he role of courts is not to make public policy, but to help assure that public policy is made by the appropriate entity . . ." Brief for Respondent at 44 n.38, *TVA v. Hill*, 437 U.S. 153 (1978) (No. 76-1701) (quoting JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A HANDBOOK FOR CITIZEN ACTION* 151 (1970)).

Getting the Fish Officially Listed

Soon after the meeting in the old fort, our little group and biologists from the university put together a package of data demonstrating that this previously unidentified fish was a separate species, clearly threatened by the dam. The packet was sent off to the Office of Endangered Species, in the Department of Interior's Fish and Wildlife Service, and we asked for an emergency listing.

Hesitancy within the regulatory bureaucracy, and 5 U.S.C. section 553(e), the rule-petitioning provision of the Administrative Procedure Act. Within two days we received word through an informant in the Department of the Interior that the package of information looked good, solid, biologically accurate. So would the Department proceed on an expedited basis to list the fish? The answer was a sympathetic but emphatic no. "We never have done one of these emergency listings, and it's quite clear that this case is going to be controversial, so no one here is going to stick their neck out to start this process anytime soon."

The construction agency, the Tennessee Valley Authority, however, would have no such hesitation about acting. Every week and month that the listing was delayed would mean just so many more trees and farms eliminated from the valley. "Can we petition you ourselves to put the listing process in motion?" "I don't see why not. It's never been done, but citizens have the right to petition the government, I guess."

Later that week, January 25, 1975, we designed and put together a formal petition to force the agency to list, using 5 U.S.C. § 553(e), a useful and under-used leveraging tool that allows citizen petitioners to frame a proposed rule in their own chosen terms and perhaps to leverage an agency out of its bureaucratic inertia.²⁸ How do you design a petition to list a species? There was no form. We invented a five-point document. The first allegation asserted that "1. The fish currently known as the snail darter *exists*. . . ." which seemed to be a logical way to start. The attached exhibit showed a photograph of the fish and three pages of scientific description recounting in excruciating detail what this darter looked like and how it was different from all other members of the darter family. The second section asserted that the fish, as far as

28. Once it receives a § 553(e) petition, an agency must act on it within a reasonable amount of time, and if it rejects the petition it must, under § 555(e), explain the rational basis for doing so, which then provides an opportunity for the citizens to challenge the denial under the arbitrary and capricious judicial review test of § 706.

was known, existed only within the Little Tennessee River Valley within the Tellico Project area. The third section asserted that the darter's existing habitat appeared to be critical to the continuing existence of the species. The fourth section showed that the Tellico Project would destroy the snail darter. The final point was that "TVA knows about the fish, its threatened status, and the Act, but continues with its timber clearing, excavating, and construction," with a letter from TVA's chief executive saying that they would not halt their ongoing activities. This amateurish petition turned out to be a sufficient scientific and logical basis to launch the rulemaking process on its way toward listing the species and its critical habitat.

"Multi-centric" government: citizen enforcement: governmental actors do not just automatically get under way when the facts and statutes require them to. Note already a basic political lesson. The administrative process often inclines toward inertia. To make statutory enforcement happen in settings that are politically-charged or burdensome, citizens often have to invest the time and effort to make it happen. The availability of citizen enforcement in American public law since the 1960s²⁹ has been a major factor in shifting government toward a multi-centric pluralism, away from the traditional bipolar model of governance (in which on one hand the marketplace provides the society's pervasive, sustaining internal drive, and government on the other hand protects citizens and society from the marketplace's excesses). This is not to say that all citizen initiatives are logical or wise, because citizen en-

29. Beginning in the 1960s a host of environmental statutes replicated the citizen enforcement provisions of the civil rights acts, and the litigation that followed built environmental law. See Toxic Substances Control Act §§ 19(d), 20(c)(2), 15 U.S.C.A. § 2618(d), § 2619; Endangered Species Act of 1973 § 11(g)(4), 16 U.S.C.A. § 1540(g)(4); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C.A. § 1270(d); Deep Seabed Hard Mineral Resources Act § 117(c), 30 U.S.C.A. § 1427(c); Clean Water Act (Federal Water Pollution Control Act Amendments of 1972 § 505), 33 U.S.C.A. § 1365(d); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C.A. § 1415(g)(4); Deepwater Port Act of 1974, 33 U.S.C.A. § 1515(d); Safe Drinking Water Act § 1449(d), 42 U.S.C.A. § 300j-8(d); Noise Control Act of 1972 § 12(d), 42 U.S.C.A. § 4911(d); Energy Sources Development Act, 42 U.S.C.A. § 5851(e)(2); Energy Policy and Conservation Act, 42 U.S.C.A. § 6305(d); Solid Waste Disposal Act, 42 U.S.C.A. § 6972(e); Clean Air Act § 304, 42 U.S.C.A. §§ 7604, 7607(f); Powerplant and Industrial Fuel Act, 42 U.S.C.A. § 8435(d); Ocean Thermal Energy Conservation Act, 42 U.S.C.A. § 9124(d); Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1349(a)(5). Most of these also provide for attorney and expert witness fee awards to the extent plaintiffs prevail. ZYGMUNT PLATER, ET AL., ENVIRONMENTAL LAW & POLICY: NATURE, LAW & SOCIETY 403 n.31 (2d ed., West 1998) [hereinafter PLATER, ET AL., NATURE, LAW & SOCIETY].

forcement can be problematic. But the snail darter case demonstrates a setting where a situation that merited statutory enforcement required citizen efforts because the appropriate agencies were unable to act. Our informant within the Fish and Wildlife Service's Office of Endangered Species recounted the agency's great internal consternation. Our listing petition looked impregnable, and that meant trouble. "My boss says we are going to move slow on this. He says you're the enemy, you're going to wreck the Act." Representatives of Senate Minority Leader Howard Baker of Tennessee and John Stennis, senior senator from Mississippi, were applying heavy pressure to halt the listing in its tracks.

The extraordinary usefulness of inside informants, and a note on killifish. This communication from inside the Office of Endangered Species emphasizes how important it is to have contacts within the system who can provide straight and relevant information without going through formal channels. Such contacts are developed through effort or luck. In this case the staffer was a biologist who had personal connections to the University of Tennessee through a network of ichthyology and herpetology scientists. It was important that the inside informant and the citizens on the outside knew and could trust one another, because the action of an individual government employee in such a highly-charged political setting can create career-ending indiscretions if the contact is publicized.³⁰ And make no mistake, the snail darter case was quickly identified as politically charged. People in the Department of Interior bureaucracy were not eager to be identified as taking the initiative to list and protect endangered species. As one participant explained, "most agency employees are killifish." Like those large schools of little fish you see swimming by the thousands, instantly shifting together, left and right, as they move through the water, the fundamental strategy of survival is to blend in with the mass, not to stand out. What happens to the fish that is larger, or faster, or different from the rest? That fish stands out and is targeted by the ever-present predators. Within

30. By the time the snail darter controversy had passed through four more years of legal process, three other special contacts had played indispensable roles in shuttling information back and forth between Washington and Tennessee, often involving surreptitious communications, "midnight phone calls," and in each case we took elaborate precautions to remain discreet, to the extent of using four different cover names so that sign-in sheets at the entrances to federal agencies and phone logs would not reveal that these staffers were talking with the controversial Tennessee citizen outsiders.

the civil service it is often safer not to be known as a person who is particularly energetic in enforcing the national policies embodied within a controversial statute.

The Power of Pork. What did it mean that Senator Stennis was leaning on the biologists of Interior's Office of Endangered Species? It marked the appearance of a major political force that subsequently launched a successful long-term guerilla war against our implementation of the Endangered Species Act. Stennis was Chairman of the Senate Appropriations Committee, and he represented the power of the pork barrel. The pork barrel is an extraordinarily powerful and complex structure of alliances throughout Congress and beyond, driven by annual expenditures of billions of taxpayer dollars ladled up by appropriations committees in both chambers and poured out into projects and programs in congressional districts across the United States. Water projects constitute one of the oldest and most powerful pork barrels, in which TVA is a junior partner. Senator Baker had been able to pull in Senator Stennis not because the Tellico Dam in and of itself was a major federal project, but because our challenge to Tellico Dam potentially posed a threat to water projects all over the country.

"The real problem for Stennis is not Tellico, but Tenn-Tom," said our informant, whom we will call Chuck Cook. The Tennessee-Tombigbee Waterway just then getting underway was a quintessential pork barrel project with a budget of four billion dollars, a totally unprecedented pork budget for that time. The Corps of Engineers proposed literally to move mountains to build a barge channel running from the Tennessee River through the mountains of Northern Alabama down to Mobile on the Gulf, creating in effect a second Mississippi River. What threat did the ESA pose? Chuck told us that soon after the snail darter story broke his office had been asked for information on endangered species in this Northern Alabama corridor, and had identified four fish and mollusk species that were threatened by the Tenn-Tom. Tenn-Tom, like most of the dozens of authorized pork barrel water projects, could not withstand the transparency of having its economics scrutinized in a public forum. If the Act's mandatory provisions could force judicial and political scrutiny of these water projects, then our little fish from Tennessee could embarrass a sprawling mass of federal largesse programs starting with Tenn-Tom. The darter was politically endangered not only by TVA, the agency that wanted to eliminate its Little Tennessee River habitat, but also by the hornets' nests it would stir up throughout many other

regions of the country. Facing this prospect, the pork barrel became a powerful and implacable foe operating within the central precincts of the political process.

This episode also underscored the political difference between appropriations committees and the regular committees of Congress. The appropriations committees wielded the power of pork. The subject matter committees—which pass and amend all the substantive regulatory laws on natural resources, agriculture, pollution, public health, historic preservation, as well as budget, banking, government operations, courts and the judiciary, labor, securities, and all the rest—are more erratic. In the daily politics of Washington it seemed to us that the appropriations committees were far more feared, a conclusion underscored by the official rules that prevent appropriations committee members from sitting on any other committee, and forbid making substantive law changes on money bills. Appropriations committees, unlike the regular committees, meet each and every year, supervising every agency and allocating funds through an array of subcommittees that almost exactly replicate the regular committees. Appropriations committees can virtually nullify a statute by eliminating its financing. The allocative ability to pour or block a flow of federal dollars into every congressional district in the nation gives appropriations committee members almost peremptory power. Members of the regular committees only revisited the statutes within their jurisdiction when opportune moments to do so presented themselves. The regular committees, however, especially their committee and subcommittee chairmen, sometimes care a lot about protecting their political turf. If you can show them that the pork committees are interfering with something they think is in their area of jurisdiction, you sometimes can get them jealous enough to fight about it.

The “sunk cost” strategy of project promoters facing statutory enforcement. The Department of Interior’s reluctance to act contrasted with TVA’s eagerness to build. In the months after the darter petition was filed TVA accelerated its efforts to condemn homes, build levees and reservoir bridges, bulldoze farm buildings and scalp trees from the project area. The agency chose to begin its “land treatment”—tree cutting and scraping—at Coytee Springs, the historic site on the riverbank marking the shoal that was the snail darter’s prime natural habitat. The bulldozing began surreptitiously before dawn. By sunrise all the trees had been cut at Coytee Springs and a cascade of mud poured out into the

river, covering for a time the endangered species' spawning and feeding habitat. Over the next months TVA crews worked two and then three shifts a day, under portable floodlights through the night, so as to spend as much money as possible and eliminate as much of the valley's homes, barns, and vegetation as quickly as possible.

What was going on here? It was the "sunk cost" strategy.³¹ Project promoters in the public and private sectors often understandably wish to get as much physically accomplished and as much money invested in a venture before their project is confronted in a legal forum. The first law of bureaucracy, public or private, is that "a rolling stone gathers momentum." The object is to get the project to a point where the defenders are demoralized and the promoter can argue "it's too late to turn back now," either because the issue is legally moot, or at the very least that a balance of equities will at that point tilt in favor of continuing the process: "Regretfully, too much has been done; too much money spent; too little of value remains to permit consideration of alternatives at this late date." The sunk cost phenomenon recurs often in environmental law. In Nashville, 150 miles to the west, the *Overton Park* case had provided a vivid example where the federal and state departments of transportation consciously knocked down houses and built the interstate highway up to the very edge of the legally-protected park, so as to be able to say then that it regrettably was no longer feasible and prudent to go anywhere but straight through the park.³² Here in the Tellico Dam case, as the citizens attempted to navigate the legal process of protecting the fish, it was continually disheartening and distressing to observe TVA's weekly progress of destruction in the valley, so clearly intended to forestall public policy considerations of any project configuration other than a dam and reservoir. Simultaneously TVA began to capture darters from the major breeding shoals and transplant them to locations elsewhere in Tennessee.

Faced with TVA's accelerated efforts to moot the issue, where could we turn? The Department of the Interior's reluctance to list the species showed the enforcement agency's weakness. Our inside contact indicated that the Fish and Wildlife Service regarded

31. See David E. Cole, Note, *Judicial Discretion and the "Sunk Costs" Strategies of Government Agencies*, 30 B.C. ENVTL. AFF. L. REV. (forthcoming April 2003).

32. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); PLATER ET AL., *NATURE, LAW & SOCIETY*, *supra* note 29, at 391 n.15. Part of the drama of that case is that it is one of just a few sunk cost cases where the ploy did not work.

the petition for listing as “a nightmare.” The agency was being pushed into a situation “which could destroy the entire Endangered Species Act; as far as the Fish and Wildlife Service is concerned, you people in Tennessee are the enemy.” This was not necessarily an irrational reaction on the part of the Department of Interior. Unlike the citizens, the Department had to function over time in a complex political setting where the anger of the public works pork barrel coalitions could be politically disastrous. And some of Interior’s own divisions were charter members of the public works pork barrel, including the Bureau of Reclamation and the Bureau of Land Management.

The Office of the President: CEQ? We went to the Council of Environmental Quality (CEQ) in the Office of the President. There was some reason to be hopeful about CEQ. We had chanced to see a magazine quotation from Lee Talbot, a senior staffer in both Nixon and Ford’s CEQ commenting that “in some cases an endangered species may be more important to the nation than a particular dam and reservoir project.” Nixon was our most environmental President, measured by the number of statutes he signed into law.³³ But in his last two years, a substantial anti-regulatory industrial backlash had mounted against the new array of environmental statutes, and Nixon quickly backed off, trying to impound money allocated for enforcement of the Federal Water Pollution Control Act. Gerald Ford, his accidental successor, did not have a clear idea whether or not he was an environmentalist. When we visited with Lee Talbot at CEQ he rapidly distanced himself from his comment about endangered species and dams, knowing that this was a highly sensitive issue and that he and CEQ lacked the ability to pursue the matter.

An introduction to Congress and the dirty little secret of government. The citizens groups in Washington advised us to find pressure points within Congress. Congress is not a monolith but an assemblage of 535 volatile and potentially potent leverage points. Trekking through a variety of congressional offices, we located a pressure point in the office of the chairman of the Merchant Marine and Fisheries Subcommittee on Fisheries and Wildlife. The subcommittee counsel had been a key player in the original

33. There were thirty-four important environmental statutes passed in the three years after the National Environmental Policy Act of 1969. PLATER, ET AL., *NATURE, LAW & SOCIETY* (2d. ed. 2001-02 Teacher’s Manual Annual Update 355-57) (historical statutory appendix). Only Jimmy Carter’s years come close, with twenty in an equivalent span, many of which were merely perfecting amendments. *Id.* at 357-58.

passage of the ESA. "You have to understand," he told us. "Most members of Congress never read the bills they vote on, and this one was no exception. Only a few members and a few of us staffers had any idea the Act could be used to stop destructive projects." Another staffer chimed, "Even if they know what these bills say, the dirty little secret of government, as you'll find out, is that just because legislatures pass a law doesn't mean they really intend that it be implemented. A lot of do-good laws are just symbolic reassurance to the public that the legislature is on top of things. If you want to know what legislators really want, look at where they appropriate the money.

ESA enforcement appropriations were trivial. The subcommittee counsel and Rep. John Dingell for whom he had worked, however, clearly had wanted Section 7 of the ESA to wield its hidden teeth eventually. "But we hoped the first case to come up would involve whooping cranes or bald eagles, not something that sounds silly." After working through the common sense details of the case with us, however, the counsel agreed to help. The subcommittee chairman would push Interior to list the darter by threatening the Department with oversight hearings on implementation of the ESA, with pointed reference to the listing process and the snail darter case. He also advised us to threaten a citizen lawsuit to force the agency to list the endangered species, a suggestion we received several times over the years from within the agencies as well,³⁴ a process which, if we had to do it, would be as difficult as it was unprecedented.

This push and advice from the subcommittee were effective. The double threat of peremptory oversight hearings and a citizen lawsuit highlighting the non-listing of species finally prompted Under-Secretary Nathaniel Reed to sign a notice of proposed rule making in October 1975, and by the end of the year the darter and its critical habitat were officially listed.

Enforcing the Law in Court

When Big Government cannot do the job. . . A listing under the ESA, however, is not self-enforcing. TVA was continuing land clearance on an accelerated schedule, and given that it would not

34. On at least two other occasions we received earnest requests from within an agency to "please sue us, and then we can go to our boss and tell him we have to do what we should already be doing in the first place." In the face of strong economic and political coalitions in the marketplace economy, agencies sometimes cannot or will not readily implement the counter-marketplace roles they were designed to play unless freed to do so by countervailing threats from civic forces like citizen lawsuits.

voluntarily reconsider its ongoing project, who now would enforce the Act against Tellico Dam? Not Congress, not the President, and, as it turned out, not Interior. Again the political setting ultimately required the citizens to take on the work of law enforcement.

What can one federal agency do against another federal agency in a situation like this where one is the regulator and the other stands in the position of a violator? The TVA sent delegation after delegation of its staffers to Washington to "consult" with the Department of Interior, but the point of that consultation throughout was to back Interior off from any threat of legal action by arguing that the Act did not apply to ongoing projects and shifting the discussion to transplantation, putting the endangered fish somewhere, anywhere, else. From the beginning, Chuck Cook told us, TVA took the position with Interior that it would talk until everyone is blue in the face about trying to find natural populations elsewhere or transplanting the fish somewhere else, but TVA would simply not discuss the possibility that its dam project would not be completed on schedule.

Where was the Department of Interior? Under political pressure, it was shrinking away from the mandates of the Act. Implicitly refuting the charge that federal agencies are constantly seeking to expand their powers, Interior tried to compromise the Act by proposing draft regulations that narrowed the range of its authority,³⁵ interpreting Section 7 as applying only *prospectively*, to future federal actions, not to ongoing projects. Interior was clearly not willing to initiate administrative or judicial proceedings against TVA, although it attempted a series of gestures in the direction of enforcement. Pressured by us the FWS began denying permits for transplantation of the fish away from the river. They created a paper trail in departmental files detailing how TVA had been repeatedly informed that its activities were likely to jeopardize the continued existence of the species. But it became evident, confirmed by our inside contacts, that when confronted by the political phalanx of TVA and its allies, the Department of Interior—

35. 42 Fed. Reg. 4868-4869. (Jan. 26 1977). Politically it is not unheard of for agencies to narrow their jurisdiction by restrictively interpreting the statutory language. EPA interpreted groundwater out of the Clean Water Act to avoid that regulatory snarl, requiring Congress later to pass the Safe Drinking Water Act. In one amusing anecdote, EPA and the Corps each tried to interpret the massive dumping of automobile tires into Connecticut wetlands as being within the other agency's CWA jurisdiction, each hoping to avoid a problem area with low enforcement appeal, high volume, and Mafia entanglements.

with 86,000 employees and a budget of three billion dollars—had made a conscious decision to rely on us citizens—a motley little group of maybe thirty-five activist students, farmers, fishermen, and a law professor in the process of being discharged—to enforce the federal Act against TVA.

Into the judicial process. The case went to trial in April of 1986. The forum offered by the court, however, was far narrower than an environmentalist would have hoped. In this litigation, as in many others, the courts at each level strenuously avoided inquiry into the practical public merits of the question. To a generation steeped in the lore of activist courts stretching to take on major public issues, our case was a reminder that the judiciary can just as easily incline toward a constricted definition of their role. Despite asserting that the subsequent holding was based on a “balance of equities,” the trial court refused to allow any evidence of existing project alternatives and allowed us to present only twenty minutes of evidence on the reservoir’s economics. The judge would not defer to Interior’s findings that the darter was endangered in its critical habitat, so actual proof of endangerment was an important part of the case, though he quashed our subpoena for testimony from the expert Interior biologist.³⁶ In any event, the trial court ultimately found that the darter was a species endangered by the destruction of its critical habitat and that was enough. The trial court failed to issue an injunction, but that oversight was rectified on appeal.

In the Sixth Circuit and the Supreme Court, given the lack of a trial record on the contesting economics and equities of the case, we successfully argued Sax’s remand to the legislature theory: When two contrary statutory directives collide, the job of the courts is not to jump in and arrogate to themselves the power to strike intuitive bargains, but rather simply to enjoin the violation. This legal argument was a political argument as well. No environmental plaintiff should want to argue for a legal proposition that produces an irrational and irresolvable stalemate. Our argument was that although the facts were complex, there were com-

36. We had expected that Interior would authorize its biologists to travel to the trial to testify on the accuracy and substantiality of its own listing, but it did not. When TVA quashed our subpoena seeking an Interior biologist’s testimony, Interior required him to take personal vacation leave to come to testify. It is unusual that TVA, the defendant, and not the federal agency being subpoenaed to testify, was able to quash the subpoena. It forced the witness to admit that he personally volunteered to testify, which TVA used to imply bias.

mon sense resolutions that could be legislated, but not by judges who should be passive, not activists. The courts' job was to maintain the status quo by injunction, which as a practical matter would shift the conflict to Congress where ideally the conflict would finally achieve transparency, be debated, and be resolved in an enlightened democratic process.³⁷

Backlash: Defending a Statutory Enforcement Initiative in the Political Process

A hot potato in the bureaucracy. Jimmy Carter was inaugurated on January 12, 1977, and nineteen days after the outsider neophyte entered the White House, the Sixth Circuit presented his young Administration with a very hot potato in the form of the injunction blocking Tellico Dam for violating the Endangered Species Act. The newspapers and broadcast media seized on the case, covering it as an example of environmentalism gone nuts, wondering how the new administration, with a President who had run as a citizen environmentalist, would handle it. Would the administration, with the powerful momentum that comes from a fresh election victory, back us and the ESA and change the political topography of the case? Some improvements seemed inevitable. The Schedule C political appointees whom the President chooses for the top ranks of the Cabinet agencies and the White House's voluminous staff could make a marked difference in policy formulation and agency planning for statutory implementation. A wave of environmentalists was moving into the top ranks of the federal agencies, including Cecil Andrus, an environmentally progressive Governor of Idaho named Secretary of the Interior, and Gus Speth of the Natural Resources Defense Counsel and Marion Edey of the Environmental Policy Center named to the President's Council on Environmental Quality (CEQ). Within a year Carter was also able to name a new member to the three-person TVA Board.

But the nature of the executive branch is such that merely changing the head does not necessarily change the mind of the organism. Interior may have had a more environmentally empathic leadership, but that may actually have weakened the Department's political position, because the anti-regulatory bloc in Congress identified the new people as threats. This message was soon received by Secretary Andrus. As far as we could see the pressure came from a number of his own divisions which included

37. See *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978); SAX, *supra* note 27, at 151.

several pork barrel agencies, from outside where the political pressure from lobbyists and members of Congress was starting to be intense, and also from within the agency's vast ranks of civil service careerists. It came as well from other federal agencies who feared their programs might face serious legal difficulties from an activated ESA, agencies like the Department of Agriculture (Agriculture) with its linkages to pesticide programs and its Forest Service timber cutting programs, and the Department of Transportation with its interstate highway construction program. The Act was a grenade, Andrus realized, that could destroy his policy aspirations and tenure in office. Within a week he was making public statements expressing tentative approval of the Ford Administration's proposed regulations defining the Act's coverage to extend only to future actions, not to ongoing projects like Tellico Dam. This hesitancy was understandable in bureaucratic survival terms. The civil service and the top officials of Interior undoubtedly cared about the ESA as well as the agency's many other missions, but the Act's application to ongoing projects represented the kind of political landmine that could severely hurt the Act as well as the Department in general.

The Iron Triangle. Why was it so politically daunting for an agency to enforce one of its own keynote statutes, we wondered? "It's an iron triangle problem," said Fred Powledge, a public policy writer who came to one of the American Rivers citizen participation workshops.³⁸ "The Department of Interior is up against a number of powerful iron triangles, and the water projects triangle is one of the strongest." What is an iron triangle? Powledge explained it was a political science term for specialized political alliances that take root within the federal government. Iron triangles have three corners—one within the agencies, one within Congress, and the third deep in the marketplace. In the water project area you have an agency like TVA or the Corps that desires the power and momentum that comes from building a public works project with federal funds. Then in Congress you have the pork committees and individual members of Congress who gain power, votes, and campaign contributions by bringing infusions of federal taxpayer dollars into their local districts. The third bloc is made up of all the special interests that profit from the projects or pro-

38. See F. POWLEDGE, *WATER: THE NATURE, USES, AND FUTURE OF OUR MOST PRECIOUS AND ABUSED RESOURCE*, 286-87 (Farrar, Straus, 1982), in which the author gives Prof. George "Rock" Pring, now of the Univ. of Denver Law School, credit for the "iron triangle" metaphor as applied to water project pork barrels.

grams, which in the water project boondoggles includes the businesses that get the federal construction contracts, other industries like barge transportation or irrigation businesses that in effect get their operations federally subsidized for free, real estate interests that can make windfalls by selling land to the agencies at a profit or getting free improvements to land they own, state and local politicians who are given the opportunity to run development boards or get to choose winners and losers in the details of project design, chambers of commerce whose members will make money from the windfall infusions of federal cash, and so on. It's a symbiosis.

All three corners of an iron triangle promote and protect each other—a virtually unbeatable combination focused on launching projects and keeping them rolling. A triangle, remember, is the strongest geometric shape there is. The culmination of hundreds of such projects forms a cohesive political structure, a national Iron Triangle on public works construction built into the heart of the governmental system. And the water triangle has analogs in other areas of government. There are iron triangles for mining, ranching, timber, transportation, pharmaceuticals, chemicals, defense, and a host of other sectors. Many are linked together through the appropriations process; others are formed through the seduction or “capture” of regulatory agencies. None of them are fond of environmentalists.

The mushroom syndrome. We saw a good example of iron triangle pressure in the regulatory setting with the United States Forest Service in the Department of Agriculture. Agriculture had been one of the agencies expressing concern about endangered species enforcement. Carter appointed Rupert Cutler, whom we had known as a professor of environmental policy at Michigan State University, to be an Assistant Secretary. He invited us to come over to discuss the ESA. “You remember how you came to my classroom last fall?” he asked. “I had forty-five students. Now I have 20,000 employees in the U.S. Forest Service directly under my command.” We discussed how he could, among other policy initiatives, integrate endangered species protection planning into the management of the national forests. But Cutler's brains and hard work within the Forest Service came up against coordinated resistance within and outside his agency. A year later he was carried out of the office on a stretcher with exhaustion and bleeding ulcers. As he later explained, “I couldn't budge my own bureaucracy. They treated me like a mushroom. You know what I mean? They kept me in the dark and fed me a lot of manure.”

It helps to have environmental groups, an Ol' Girl Network, and a friend in the White House. As it turned out, Interior's policy was reversed, in part at least through the fortuity that we were given a political introduction to the nascent Old Girl Network. The environmental groups in Washington had greeted our case's arrival with mixed enthusiasms, but most of them³⁹ ultimately provided advice, logistical support, and hundreds of hours of lobbying effort for the ESA over the last three years of our fight. Their help was critical. Their sophisticated presence in Washington had clearly made a difference in assuring that the environment is seriously considered in the daily politics of the capital. They gave us connections as well as support in lobbying. Through Anne Wickham, Conservation Director of Friends of the Earth, we were given an entrée to a nascent Ol' Girl Network and soon connected with a woman who was one of Andrus' top aides, so that the full facts of the Tellico impasse began to be communicated to the Secretary directly.

Even more important, Wickham introduced us to several people on the White House staff, particularly Kathy Fletcher who was working in Stuart Eizenstadt's Domestic Counsel. With the aid of these staffers the Tellico case in all its ecological and economic details became a White House case file. After the President had been briefed, we were told, his good ol' Georgia buddy who was chief of liaison with Congress, Bert Lance, exclaimed to Carter "I hear they're talking about stopping that dam for a little minnow." The President replied sternly, "I can't think of a better reason!" an answer that was heartening to us as an indication of his personal feelings, if not his understanding of the full facts of the case. We had put a great deal of economic detail into the Domestic Council case file to show the Administration that this purported example of irrational environmental extremism could be reversed 180° and used by the Administration to demonstrate that good ecology makes for good economics. We thus hoped the Carter people would use the facts of our case to validate not only the ESA, but other environmental initiatives of the Administration as well. After the intervention of the Domestic Council, doors did begin open-

39. The groups that regularly provided support for us and the defense of the ESA, were Friends of the Earth, American Rivers, Environmental Policy Center, Sierra Club, National Wildlife Federation, Trout Unlimited, World Wildlife Fund, and Defenders of Wildlife. Among our sagest mentors in Washington was 1998 Garrison Lecturer Oliver Houck, then General Counsel and Vice President of the National Wildlife Federation.

ing to us within Interior. Interior's statements to TVA became more emphatic. Transplantation away from the river was halted completely, and in the congressional hearings in the summers of 1977 and 1978 the Administration took a position affirming the workability of the Act and noting the intransigence of TVA in its truncated "consultations" with Interior regarding the dam.⁴⁰

The Press. The most significant political consequence of the Sixth Circuit's injunction, however, was in the media. From the beginning of the campaign we had hoped that the press would ultimately give the case the perceptive scrutiny and transparent public forum it desperately needed. From the moment the injunction was announced, however, the press focused only narrowly on the story, the ironic disproportion of the "two-and-a-half-inch minnow, discovered at the last moment by elitist environmentalists, being used to stop a large multi-million dollar hydroelectric dam." It did not matter that virtually every element of that caricature was inaccurate. The story was too good to pass up. The press from the beginning was sucked in by the beguiling cliché of little-fish-versus-big-dam into consistently framing the story through the classically misleading epigram—"It's a tradeoff. You have to choose: Will it be economic progress or environmental quality? You can't have both." There was no second wave of revisionist stories revealing the dramatic fact that this dam did not pay, was a wasteful federal land development boondoggle, and that the fish was saving a valuable natural resource and millions of dollars for America. The economic case for the darter never made it to the newspapers and television screens of the United States.⁴¹ As re-

40. TVA remained truculent. Kathy Fletcher had been instrumental in pushing the nomination by President Carter of David Freeman, an accomplished technocrat with expertise and energy, who was extensively briefed on the Tellico Project before his appointment to the Board. In the event, however, Freeman was a victim of internal TVA politics, because as one of three directors he could not shape policy, and even when he was appointed Chairman, he suffered acutely within TVA, his own agency, from Rupe Cutler's mushroom syndrome.

41. Our evolving rap on Tellico had five steps leading to an inexorable conclusion that the dam project did not make rational economic or common sense while the options that preserved the darter did:

- *Endangered species as canaries-in-the-coalmine*—under the terms of the Act the darter serves here as a *sensitive natural indicator of human welfare as well as ecology*, identifying the threat posed by the destructive ill-conceived project to pure, clean, fertile, habitat resource values that are of great potential worth to the human community as well.
- Tellico is a *recreational and land development project*, not a power dam.

counted elsewhere,⁴² the force and effect of this media coverage, and the fact that it never changed over time, ultimately undercut even a presidential veto.

Working with the executive. Having belatedly come to an active support of our position, the Department of Interior, we noted, did not know how to use us outsiders in the ongoing political defense of the Act, and we had to push to stay within the process. At one point, for example, we were permitted to sit in on a planning session for the upcoming 1977 Senate hearings, which would be a significant opportunity to defend the rational operation of the Act as a whole. A review of the ESA over the prior three years would probably show, we argued, that there had been dozens of potential conflicts between the Act and federal projects over that time, and good faith administrative process had crafted win-win resolutions—alterations in technology, timing, scope, location, design, and process, as well as developing mitigations, to avoid the conflicts. But the agency did not have that data compiled and were not sure the task could or should be done. We had to push, and the Fish & Wildlife Service finally agreed to give an office and phones to two of our law students from Michigan. Mardi Hatcher and Deborah Labelle volunteered the first part of their summer of 1977 pulling together what became the Carter Administration's official record of what actually had been going on in interagency implementation of Section 7 around the nation. By the end of their research, Mardi and Debbie had put together a catalogue of more than 4000 cases where field personnel reported potential conflicts between the Act and federal agency actions, many of

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- *300 plus farm families are being thrown off their prime agricultural lands by federal condemnation to provide acreage for a hypothetical Model City that TVA planned to develop with Boeing, a plan that was abandoned in 1975 as economically irrational.*
 - *Valuable river-based project development alternatives exist that would save the darter and get the farmers back on their lands, and produce far greater recreational, commercial, and tourism development benefits than a dam.*
 - *TVA, however, consistently refuses to consider any options except their original obsolete dam plan that will destroy the darter.*

The conclusion that this analysis aimed at? That the snail darter case demonstrated the ESA as a workable law that makes sense, which identifies important opportunities for necessary adjustments and protections for human welfare as well as wildlife. But this analysis never received coverage or scrutiny in the press despite reams of fish-dam stories, nor did it penetrate the congressional process that ultimately eliminated the river.

42. Zygmunt J.B. Plater, *Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance*, 32 ENVTL. L. 1 (2002).

them trivial but dozens of them potentially serious. In subsequent hearings this bureaucratic record proved to be extremely useful, showing that of all those thousands of potential conflicts only three had not been resolved,⁴³ all three demonstrating agency obstructionism rather than infeasibility of resolution through compromise and negotiation. But without the efforts of the two law students the Carter Administration would not have had the data on regulatory success necessary to defend the rationality of the Act and its implementation.

OMB. Who were those guys? There were, however, moments of greater effectiveness on the part of the Administration. At one point when the Senate subcommittee had scheduled hearings featuring a dozen federal agencies testifying on the Act, we citizens working with the staff and the Administration were worried because most of the selected agencies were those tied to iron triangles—in agriculture, interstate highway construction, mining, grazing, and the like, as well as TVA whose adamant opposition to implementation of the ESA was predictable. We asked our contacts in the White House, “Do you realize that this testimony is going to be a cascade of federal agencies bemoaning extreme restrictions on important national programs?” We were told not to worry. Other than TVA’s, the statements from all but two agencies had been thoroughly vetted. They would not assert the inflexibility and irrationality of the ESA, as originally drafted. TVA as an independent agency and the party in ongoing Supreme Court litigation would not be countermanded by the Administration. Which two agencies had not been contacted? The Department of Transportation and the Forest Service. Later that morning, standing in the marble corridor outside the Russell Senate Office Building hearing room, we were bemused to watch as two guys in gray suits halted three Transportation officials as they strode up the hall to enter the chamber. The two guys took Transportation’s draft statement, held it up against the wall, and with a magic marker began to strike out paragraph after paragraph. When the process was over the statement had little but a bland opening and

43. The three cases were the case of a Mississippi interstate highway planned to go straight through the nesting area of the Mississippi Sandhill Crane, *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976); a dam in Nebraska that would eliminate critical areas of the whooping crane Midwest flyway, *Nebraska v. Rural Electrification Admin.*, 1978 WL 23470, 12 ERC 1156, 8 ELR 20789 (D. Neb. 1978), *Nebraska v. Rural Electrification Admin.*, 23 F.3d 1336 (8th Cir. 1994) (both concerning the Grayrocks Dam); and Tellico Dam.

closing, with nothing between. The dejected Transportation spokespersons, and later the Forest Service witnesses who went through the same procedure, could only say to the committee chairman that they were authorized to say their agency had no quarrel with the public purposes of the ESA in general, they believed that implementation could be worked out over time to satisfy the different statutory mandates, and they would have to provide a clean copy of their statements at a later date.

Who were those two guys in gray suits? OMB. The Office of Management and Budget has a special role in overseeing the budget and finagling funding flows among the agencies, projects, and programs of government that, despite changes in the congressional budget process, retain substantial leverage for the President.⁴⁴ When the President's Domestic Counsel decided the policy of the Administration was to declare the ESA reasonable, the OMB would enforce it with a magic marker against the marble walls of Senate corridors if necessary.⁴⁵

Hearings can be parades with no destinations. After the agency testimony the Senate hearings in 1977 and 1978 opened up a parade of witnesses from across the country, and the national politics of this issue quickly became apparent. Senator Garn would introduce a small family rancher from Utah with fears about the Act, Senator Packwood would introduce a small mill owner from the Northwest lumber industry, and dozens more came to testify against the Act. (It is interesting how the largest industries try to find mediagenic little guys to represent their positions—the widow running a small ranch who fears protected wolves eating her calves, the grizzled prospector worrying about his grubstake mining claim, the Portuguese fishing family whose mortgage depends on evading the quota, the homeowner who

44. See *infra* note 71.

45. This political phenomena was given a further twist when TVA Chairman Wagner announced at the beginning of his testimony that the White House had specifically allowed him to proceed with testimony in opposition to the Act. Junior Senator Malcolm Wallop of Wyoming reacted with disbelief, asking whether that meant that all the other agencies had given censored testimony to the Committee. Wagner said that was so, but the rest of the Committee shushed Wallop, indicating to him that this was a standard procedure when agencies testified. Agencies, particularly those within the President's Cabinet, should be considered declarants of Administration policy, not witnesses sworn to tell what they really thought to the senators who had invited them to testify. See *Endangered Species Act Oversight Hearing Before the Subcomm. on Res. Prot. of the Senate Comm. on the Env't & Pub. Works*, 92d Cong. 366-78 (1977) (discussion with federal witnesses noting that they can speak directly only when directly asked for their real opinions).

claims his house burned because endangered kangaroo rat habitat prevented his clearing a firebreak, the under-employed logger who fears protections for the spotted owl⁴⁶—and we of course did too.) The National Association of Homebuilders, the pulp and paper industry, the mining industry, the Edison Electric Institute—the hearing docket reads like a roster of the National Association of Manufacturers and their lobbying arms. The Pacific Legal Foundation, an industry-funded “public interest law foundation” was represented by sleek, silk-stocking attorneys testifying as to the intractable irrationality of environmental protection regulations exemplified by the Act.⁴⁷

The politics of Congressional Hearings in practice did not reflect the wistful premises of eighth grade civics textbooks. For us observing the political process, perhaps the most important lesson of the hearings was seeing what hearings did and did not accomplish. Hearings are a type of forum that has no necessary product except the fact of having been held. Hearings are not calculated to reach a “verdict.” They are opportunities for just that, a “hearing.” The endangered species hearings in both Senate and House produced significant opportunities for us citizens and our allies in the environmental movement to present information about the logical economic and empathic reasons for protecting endangered species. It became clear quite quickly to the Committee staffers on both the House Merchant Marines and Fisheries Committee and the Senate Public Works and Environment Committee that TVA’s arguments did not withstand the light of scrutiny, and that

46. These examples are affecting to hearing audiences, though they often have a skewed relationship to actuality. The kangaroo rat story was inaccurate on the record, more lumbermen would have their jobs under selective cutting than under mechanized clear-cutting that most endangers species, etc.

47. See *Amending the Endangered Species Act of 1973: Hearing on S. 2899 Before the Subcomm. on Res. Prot. of the S. Comm. on the Env't & Pub. Works*, 92d Cong. 248–52 (1978); *Endangered Species, Part 2: Hearing Before the House Comm. on Merchant Marine & Fisheries*, 92d Cong. 849–56 (1978). This testimony was revealing. Several days before the hearings we had extensive discussions with a Pacific Legal Foundation (PLF) attorney in the national office showing that the endangered species in the Tellico case was serving as the sole legal protection left for the private property rights of farmers living in the valley being condemned for a development project that was economically irrational as well as “socialistic” in putting TVA in the land sale business. The PLF, we argued, should be on the side of private property and economic integrity and against highhanded government agency condemnations. The PLF’s liaison on the issue, however, while accepting the validity of the data we supplied from TVA and the GAO, sheepishly told us the Foundation could not reverse its position based on the facts of the matter, because its political orientation on this issue was obliged to be pro-industry and against implementation of environmental regulation under the ESA. Their testimony excoriated our snail darter case.

the citizen group from Tennessee had a full and sufficient answer to all the allegations leveled against the fish. The trouble with a hearing, however, is that the only people who “hear” are those who happen to be in the room. A committee’s hearings do not necessarily attract even a majority of its own members. Sometimes there would be only one or two members of the committee dutifully sitting at the dais during the presentations. Given an array of competing opportunities, members choose to come or not based on some internal calculation of whether the session will be entertaining or useful to them personally, and once a session is over in most cases it is unlikely that anyone in Congress will ever again cast a human eye upon the transcript or the written testimony scanned into the official hearing record and published by the GPO.

The Press, again. Likewise the press. It was clear that one of the major political functions of a hearing is the hope that it will attract and focus news media reporting on a particular committee or issue. Media attention is not automatic. It depends on the “hooks” that are presented in the occasion—a big name witness, a juicy twist that would be attractive to news audiences, a news climate building momentum, the infotainment character of the hearing as it unfolded.⁴⁸ For us living the controversy, there were deep pangs of jealousy walking down the corridors of the Capitol seeing television cables and phone lines snaking out of the doors of hearings deemed by the press to have sex appeal. Strangely, for a story that repeatedly was treated as a cultural epigram—little fish stops big dam—our hearings, which over time demonstrated the solid economics of species protections and the dysfunctionality of the case for the dam, did not register the same kind of press attention. Perhaps they were a letdown, deflating the easy and familiar fish–dam cliché. The press coverage of hearings was erratic. The line up of agencies testifying that the Act was workable on the actual administrative record was almost completely ig-

48. We heard about this need from colleagues at Syracuse’s Newhouse School of Public Communications when we asked them to explain how the press decided what to cover in their papers and broadcasts. One said, “Well, you have really asked The Big Question. [Although] the short answer is: Nobody really knows, the ‘standard’ answer seems to be ‘Whatever they [or their editor] think their reader/viewer will be interested in.’” Most news departments, they said, use some version of a common list of factors in deciding what to publish: Conflict, impact, interest (of audience), novelty, prominence (people, institutions, etc), proximity, and timeliness. E-mails from Barbara Croll Fought and Patricia H. Longstaff, Professors, Syracuse University, S.I. Newhouse School of Public Communications, to David E. Cole, Research Assistant, Boston College Law School (July 25, 2001) (on file with author).

nored. That was not the story that had the infotainment buzz to it. The press did, however, often pick up on piquant anecdotes from witnesses brought to Washington by their respective industries to show more examples of the standard story frame, fish versus dam, species versus people, environmental protection versus economic health. When a potential conflict surfaced in Maine between an endangered plant and the Army Corps of Engineers' proposed Dickey-Lincoln Dam, the press jumped all over the ridiculous-sounding name of "Furbish's lousewort," without focusing on the merits of the project or the fact that it was the Army Corps, not environmentalists, who announced and bannered the possible ESA conflict.

The GAO and Gore of economic review. Frustrated by shallow press coverage and lack of success in our attempts to find a forum that would produce a convincing verdict on the economics of our case, a smoking gun to present to the press, we followed up on a sage suggestion relayed to us by Brent Blackwelder, the head of American Rivers and the Environmental Policy Center. He suggested we try to get an analytical review of Tellico economics from the General Accounting Office (GAO). Like many attorneys then, we had never heard of the General Accounting Office, and learned that it was an arm of Congress which sometimes produced incisive accounting studies of the economics and practicalities of controverted cases if a chairman of a full committee signed a request letter for such a study. We drafted a letter for the signature of the Chairman of the House Merchant Marine Committee, who said he would only sign it if we could get backing from a member of the Tennessee delegation.⁴⁹

Finding a Tennessee representative who was willing to give even just off-the-record backing for a reasonable economic study of the merits of a TVA dam proved difficult. We went from office to office and finally, under face-to-face exhortation from Tennessee law student Hank Hill, Al Gore, Jr., a young freshman congressman from middle Tennessee who asserted a strong personal commitment to rational environmental analysis, authorized us to convey his oral backing for a GAO study to Chairman Murphy, though he would not put it in writing. Waiting in the Chairman's office with the unsigned letter in hand, I received the phone call from Hill that Gore had given his OK. As I turned to go into the

49. Territorial localism exists in Congress as well, so that members tend to defer to the local turf of House and Senate colleagues.

committee hearing room carrying the verbal go-ahead for the Chairman's signature, however, an urgent phone call rang onto the switchboard. The person who took the call, a staffer whom I knew and liked and who apparently knew and liked us, turned with consternation on her face. "I have an urgent message from Mr. Gore. He wants Chairman Murphy to know that he has just told some Tennesseans they could say he supports a GAO study of the Tellico Dam, but he does not in fact want that economic study and asks Mr. Murphy please not to issue the request." The staffer turned to me and said, "I'll give you five minutes, and then this message gets delivered to Chairman Murphy." Dashing down the corridor to the committee room, three minutes later we had the Chairman's signature. When Gore called Murphy personally later that day to ask that he rescind the letter, the Chairman chuckled and said he would not. "Those boys from Tennessee beat you fair and square, Al." So despite Al Gore's attempt to double back, the request letter was honored and GAO prepared the study we had hoped would be forthcoming.⁵⁰ On its own terms the GAO study was everything we had hoped. When it appeared in October of 1977 it was extraordinarily straightforward, for the first time publicly declaring the economic shortcomings of virtually every aspect of TVA's justifications for the dam.⁵¹ The Comptroller-General's team, reviewing each benefit claimed for the project and the existence of river-based alternatives concluded that TVA's justifications for Tellico "do not give a truly valid picture," were "statistically weak," and "inflated." The GAO report ended with an unusually decisive "Conclusion and Recommendation to Con-

50. In his book, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* (Plume 1993), Mr. Gore unaccountably leaves out any mention of the Tellico Dam case, though it was the biggest environmental case coming out of his home state of Tennessee in that decade, the most important case under the ESA, and one would have thought it a paradigm example reinforcing his arguments about the importance of rational overall environmental accounting.

51. See COMPTROLLER-GENERAL OF THE UNITED STATES, REPORT TO THE CONGRESS: THE TVA'S TELlico DAM PROJECT—COSTS, ALTERNATIVES, AND BENEFITS, EMD-77-58 (Oct. 14, 1977) [hereinafter GAO REPORT], the GAO Report requested by Chairman Jack Murphy and Subcommittee Chair Robert Leggett of the House Committee on Merchant Marine and Fisheries. The GAO is an agency of Congress itself, not an executive agency, established to inform Members of Congress on complex accounting issues and beyond. 2 U.S.C. § 601(b)(4) (2000). This forum can be dramatically useful to citizens trying to obtain an authoritative confirmation of their analysis of challenged projects and programs, but the GAO needs to be requested to do a study by powerful congressional figures. The Tennessee citizens were able to get the request from two committee chairmen through luck, legerdemain, and a small bribe, which is another story.

gress"—“The Congress should prohibit by law the Authority from spending any more appropriations for work on the project that would further endanger the darter” or be wasted if the dam was not completed, pending an intensive economic rethinking of the project.⁵²

The real lesson of the GAO study for us, however, was not the conclusions it drew but the fact that they made no difference—because they made no media splash. The GAO study, though we carried it to press offices throughout the Capitol and tried to focus the committees’ attention on its dramatic conclusions, was received largely with silence. Not even one news story appeared in the national press noting the report’s dramatic verdict—reversing the standard fish–dam story—that this dam project, despite millions of dollars and fifteen years of work already invested in its construction, still could not be economically justified. What we sadly discovered was that in official Washington, if the newspapers or broadcast media do not pick up on a story, the story does not exist.

The Supremes. The politics of the case within the Supreme Court argument is a story for another day, but a political twist before the day of argument showed us that the person and policies of a President are not irrelevant and of no effect. Jimmy Carter had been persuaded by his Attorney General, Griffin Bell, that the Department of Justice should represent the TVA in the Court. But our allies in the Domestic Council pushed Interior Secretary Andrus to prepare a counter brief against the Department of Justice and TVA. After intensive internal negotiations (“This is just like Watergate politics,” Attorney General Bell fumed⁵³), a devastating Department of Interior brief countering each of the TVA’s arguments was bound into the back of TVA’s own brief as an Appendix refuting all that preceded it. This meant that the Attor-

52. GAO REPORT, *supra* note 51, at 29, 32.

53. Quizzed about the split federal voices in his brief, Attorney General Bell said during the oral argument, “I do not favor this system. We have one Attorney General and one Solicitor General, and I think that ought to be it.” Transcript of Oral Argument at 30, *TVA v. Hill*, No. 76-1701 (U.S. April 18, 1978). Bell’s response reveals an unspoken riddle. What exactly is the role of the Attorney General when he decides to represent an agency’s position? Is he taking that position as attorney for the agency, or as attorney for the entire federal government? Bell seemed to think that, short of the President, he as Attorney General or his deputy the Solicitor General should be allowed to decide what the position of the entire Administration on the Endangered Species Act was to be. That’s over-reaching. No wonder Secretary Cecil Andrus reacted violently and submitted a counter-brief.

ney General went into the oral argument carrying a brief in which the federal government argued for us, as well as against us. It helped us and the Act, and caused Bell a good deal of consternation during the oral argument. The pro-ESA split-brief probably would never have happened in the Ford, Reagan, or Bush Sr. or Bush Jr. Administrations.

For the citizens, the Supreme Court litigation was a double forum, both legal and political. The brief and many points in the argument were calculated not only to raise the legal arguments—primarily statutory interpretation, separation of powers, and the proper role of equitable balancing—but also to get across the real facts to American public opinion to secure our political position. Maybe from the briefs and arguments the public would finally see that this was not a hydroelectric project, that it involved massive condemnation and resale of private property, eliminating farms, recreation, and historical resources. Unfortunately, although the first part of the agenda was satisfactorily completed—the Court upheld the injunction against Tellico Dam, 6-3—the media never got beyond the silly-little-fish-versus-presumably-important-dam story. We may have won the argument against the Attorney General in the Court, but he won the news spin in his press conference on the Court's front steps, where he waved the little fish in the air and said "this is what it's all about, and it's ridiculous." The media loved it.

God Squad. After the Court's decision upholding the snail darter injunction, Howard Baker and the pork barrel started agitating for a legislative override. Senator John Culver—perhaps because he liked farmers even though these Tennesseans lived far from his Iowa constituents, or to defend his subcommittee's turf, or simply to fight for what he knew was right—though he was just a freshman senator, heroically defended the Act against Baker's attempts to water it down and override the Tellico injunction. Culver then brokered a compromise ESA amendment with Baker: They would create a Cabinet-level Endangered Species Committee, almost immediately dubbed the "God Squad," with the power to override the Act and exterminate a species if three criteria were met. The snail darter would be the first case to go into this gauntlet.⁵⁴ We were pleased with the amendment, hoping that it would

54. See ESA Amendments of 1978. The three criteria were set out in the amendment:

§1536 (h) . . . The Committee shall grant an exemption . . . if, by a vote of not less than five of its [seven] members voting in person—

finally produce a highly publicized verdict against the dam, so to help assure its passage we opposed it. In that political context, if we had supported Culver's amendment Baker might well have had second thoughts. If the environmentalists opposed it, however, it must be good.⁵⁵

We approached the day of God Squad judgment with trepidation. We had worked surreptitiously behind the scenes with the committee staff (was this ethical?) to build a full record of project dysfunctions. By the terms of the amendment, however, the God Squad was directed to *ignore* all the project's sunk costs. If the fish and its river were to survive in their natural condition, their merits would have to win on today's balance sheet, outweighing fifteen years of past expenditures. As the staff analysis of both sides of the case came to a close, there was silence and then Charles Schultze, Chairman of the President's Council of Economic Advisors, cleared his throat. Would he say it's too late to turn back now?

Well, somebody has to start . . . The interesting phenomenon is that here is a project that is *95% complete*, and if one takes *just the cost of finishing it* against the [total] benefits, and does it

(A) it determines on the record [after a full hearing] that—

- (i) there are no reasonable and prudent alternatives to the agency action;
- (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;
- (iii) the action is of regional or national significance. . .

Later a fourth criterion was added in part in response to TVA's behavior on Tellico:

- (iv) neither the federal agency concerned nor the exemption applicant [after having received notice of the risk to the species] made any irreversible or irretrievable commitment of resource . . .

The original text of the first three exemption criteria were drafted by a non-attorney staffer who serendipitously had taken our course in Environmental Law for undergraduates and graduate students at the University of Michigan.

55. Our position was consciously disingenuous, given our continually eroding opinion of legislators. But we argued in effect "Don't take these tough decisions away from where they belong in Congress, the democratically appropriate forum, and put them into an expert executive review panel. Oh please, Br'er Fox, please don't throw us in that there briar patch!" Despite our attempts to explain to Culver that our stalking horse stance positioned him as a centrist in the compromise, the senator took offense, blistering our position paper on the God Squad—which said it was "another unneeded bureaucratic committee, if Congress would take its hearings seriously." A journalist who was shadowing Culver during this time reported his fury that "the press releases went out saying [his God Squad compromise] was a know-nothing attack on the ecosystem." ELIZABETH DREW, SENATOR, 33 (New York, Simon & Schuster) (1978).

properly, *it doesn't pay!* Which says something about the original design!" [applause]⁵⁶

The God Squad voted unanimously to deny the exemption and uphold the Tellico Dam injunction based on economic grounds. Almost as unanimously, however, the newspapers and broadcast media, which had bannered the fish-dam cliché as the lead story when the Court issued its decision based on the fish, ignored the dramatic revisionary verdict showing that the ESA and the darter lawsuit made solid economic sense. Their silence proved fatal.

A forty-two second appropriations rider. To our sorrow, we soon learned about "riders." From January to mid-June, nothing happened. The Carter Administration was off balance trying to cope with Panama Canal turmoil, attempts to repeal the Department of Education, pork barrel assaults on the President's water policy, and smoldering opposition to his outsider politics. David Freeman, Carter's TVA appointee was incapable, for reasons of personal style it seemed, of working with us to get farmers back on the land or to publicize the project's defects and the attractive alternative developments available for the river valley, all of which would have dramatically changed his and our political context.

And then we learned about riders. Late in the afternoon of June 18, in the almost-empty House chamber, the appropriations committee slipped a brief amendment onto the water and energy funding bill without allowing it to be read out loud.⁵⁷ Although it

56. See *supra* note 12.

57. 125 CONG. REC. H-15301 (June 18, 1979). The House was officially in session, but very few members were in attendance, with the exception of the Appropriations Committee members who all were sitting together as a series of appropriations bills for power and water development were being brought to the floor. A representative from New York made a short speech about avoiding nuclear hazards. The docket then shifted to the TVA appropriations. Rep. John Duncan of Tennessee took the lectern. "Mr. Chairman, I offer an amendment." The clerk began to read "on page 28, line 18, strike the period and insert ' provided, notwithstanding the provisions of. . . '" At this point, Duncan broke in, "Mr. Chairman! Mr. Chairman! Mr. Chairman!" to waive the reading of the amendment's text. The Speaker pro tem turned to the committee members sitting on the floor, and asked "is there objection to the request of the gentleman from Tennessee?" Rep. Myers of Indiana stood, and said "the minority has reviewed the amendment and accepts it." Chairman Beville stood and added that the Democrats had "no objections to the amendment." The Chairman called the question on the amendment that had not been read. The committee members called out "aye." No one else in the chamber knew what was going on. There were no nays. "The ayes have it." In forty-two seconds, six years of our citizen litigation had effectively been reversed. The full text of the amendment overrode all laws that might block construction of the Tellico Reservoir, not just the Endangered Species Act, and ordered that the reservoir be completed forthwith. The actual truncated reading of the amend-

was not discovered until the Congressional Record came out the following morning, in those forty-two seconds that rider effectively reversed six years of our labors in the agencies, courts, congressional hearings, and the unique forum of the God Squad. (Ten seconds later the committee similarly overrode a central provision of Carter's water policy, nullifying the Water Resources Council's authority to review the economics of all subsidized federal public works projects.⁵⁸)

We tried desperately to get the snail darter rider stricken from the Christmas tree appropriations bill, but the pork barrel's political superiority to the Administration was becoming sadly evident. In a sharp letter sent to all 535 members of the House and Senate, Secretary Andrus reminded them that they had appointed him Chair of the special seven-member Committee to scrutinize the Tellico Dam, and the Committee had unanimously found "on the basis of economic considerations alone, the project is not justified."⁵⁹ On this record, Andrus said, "I intend to urge the President to veto the . . . bill if the language on Tellico remains . . ." and "I strongly urge [you] . . . to strike the Tellico language from the bill."⁶⁰

But Congress, though it has nearly peremptory power in functional terms of day-to-day dominance of the political life of the federal government, does not operate on factual merits but on political merits. Its insider players, internal deals and alliances, and selective perspectives of self-interest dominate its day-to-day actions. As our motion to strike the rider came to a vote in both chambers (an accomplishment in itself), appropriations committee members worked the floor with Howard Baker and House Major-

ment and the voice votes can be heard on the Library of Congress tape of that date, and on a video clip in the possession of the author.

58. Pub. L. No. 96-69, 93 Stat 497 (1979).

None of the funds appropriated under this paragraph may be expended by the Water Resources Counsel for the review of . . . any pre-authorized report or proposal, or any pre-construction plan . . . for a federal or federally assisted program or a related land resources project or program unless funds for these purposes are [specifically] authorized to be appropriated by Congress in a statute enacted after the date of enactment of this Act.

In other words, unless the pork barrel committees gave special funding to scrutinize their projects, which would not occur prior to Hell freezing over, the Water Resources Council was forbidden to scrutinize them.

59. Letters from Secretary of the Interior Cecil Andrus to Members of the House and Members of the Senate, July 16, 1979 and July 27, 1979 (copy on file with Pace Environmental Law Review).

60. *Id.*

ity Leader Jim Wright, saying a "No" vote was obligatory to save the Congress's traditional logrolling public works system. The factual public merits of the case were not the issue, but rather the political merits of the pork barrel. The darter and the river lost by 100 votes in the House and narrowly in the Senate.⁶¹

Note the political reality: Virtually every member of Congress knew from Andrus's authoritative letter that the dam's claimed merits were objectively false and the environmentalists' case was economically and rationally sound. The appropriations committees, like TVA, presumably had known this from the start. But the majority of members tilted against the darter and the Act for their own internal institutional reasons, and the only question was whether anything could force a majority nevertheless to vote on the actual facts. What might have induced them to follow the civic merits of the issue?—a realistic threat that an informed public would perceive what they were doing.

Deeply distressed, we realized that the issue was *not what the congressional majority knew* about Tellico and the ESA. It was that *the congressional majority knew that America did not know* the merits of the case, and probably never would, so they could vote the accustomed insider game with impunity.

Ending with a whimper. So now it was a veto game. The darter's defenders and our NGO allies throughout the Washington conservation community, along with Secretary Andrus, began a campaign to obtain and uphold a veto of the bill. Carter was to make his decision on the afternoon of September 25, then board Air Force One to fly to meetings with civic and community leaders in New York City. With an hour to go before his departure, Carter had decided to veto the bill, and drafted a veto message for its release. The Domestic Council notified us to be ready for a call and to start preparing publicity on the veto. With the help of Dick Ottinger and other stalwarts in the House, we had lined up 163 votes to sustain the veto, solidly more than the 145 required. With a veto, maybe at last America could be brought to see the facts. We waited anxiously. Two hours later we got a call patched through from the presidential plane. "Deacon is calling." "Hello, Professor Plater? I understand you have been working on this matter and wanted you to know I have decided it is best to ap-

61. House Roll Call No. 427, 125 CONG. REC. H21,987-22,011 (Aug. 1, 1979) (TVA wins 214-184 [36 abstentions]); Al Gore voted against the darter, Newt Gingrich for; Senate Roll Call Vote No. 269, 125 CONG. REC. S23,863-272 (Sept. 10, 1979) (TVA wins 48-44 [8 abstentions]).

prove the appropriations bill as it stands." To my angry remonstrances that ensued he repeatedly said that signing the bill was a concession he felt forced to make "because the Appropriations Subcommittee Chairman is insisting on this rider I think I am doing the best I can for the environment on this This is not an issue on which we can prevail."⁶²

The Press, again. Later that fall (while pursuing yet another unsuccessful attempt to save the darter and the river by bringing a constitutional lawsuit to overturn the statute on First Amendment Native American freedom of religion grounds⁶³), we learned what had apparently happened in Carter's head that day. Friends in the White House reported to us that just before the President boarded the helicopter to fly to Andrews Air Force Base for the trip to New York, Frank Moore, Carter's fellow Georgian and chief of liaison with Congress, had come into the Oval Office. "I hear you are planning to veto that bill with the TVA rider in it?" "Yes," Carter reportedly said. "The bill undercuts our environmental program and all the work Andrus's Committee put into this thing." "Mr. President, you cannot veto this bill. If you do, you are going to wake up tomorrow and in the papers all you'll see is editorial cartoons of you holding a Snail Darter in one hand and a Killer Rabbit in the other. You can't afford that kind of press."⁶⁴ Carter yielded, judging that even The President of the United States in a pointed veto message could not get this endangered species success story through to the American people.

The significant audience, it finally was clear to us, was not the President and not the Congress. President Carter, a particularly weak executive, nevertheless reflected the general vulnerability and dependence of the modern chief executive toward the power and volatility of Congress. And the actions of Congress

62. Personal Notes of author, 9:30 p.m. (Sept. 25, 1979) (on file with author). Why did Carter bother calling? Apologies, with a deep desire for forgiveness, we were told, were part of the way he operated.

63. See *Sequoyah v. TVA*, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

64. The killer rabbit reference is to a story that had come out in the press mocking Carter for being attacked by a swimming rabbit while fishing in the South one day on a vacation from Washington. See, e.g., Kenneth Bredemeier, *Carter Told to Yell "Shoo" at Rabbits*, WASH. POST, Sept. 4, 1979, at A5; Henry Mitchell, *Any Day: Animal Animus and The Ripper Rabbit*, WASH. POST, Sept. 7, 1979, at C1. Editorial cartoons were regularly mocking Carter's diminishing political strength and his inability to command media respect.

showed us that for public interest advocates the most practical constraint on Congress was the coverage and climate of the press.

But in the Tellico Dam case, the political process was able to ignore the public merits of the controversy—ultimately finessing the snail darter through a business-as-usual maneuver of the pork barrel's inside game—because even though the case was getting lots of stories, those stories pictured it as a frivolous excess of hyper-technical environmentalism. Thus, the insider pork barrel was able to fly beneath the radar of the public's awareness. The public never heard even a hint that the snail darter injunction might make economic sense. When America heard that the dam would be completed, it was greeted as a rational outcome, long-expected, too-long delayed, finally applying common sense to environmental extremism. (And to the end, the people of East Tennessee never heard that they could have had far more and better development in the valley, keeping the river and the farms as well. Today, TVA's Tellico reservoir is matter-of-factly taken for granted as the only alternative that was available. What is, is.)

The dénouement of the snail darter saga obviously was dismally frustrating to those who, after such a long painful odyssey, had brought the dramatic facts to the highest official forums of government only to be crushed. For many, especially the farmers who had fought so long and now must watch wealthy resort subdivisions developing on their lands and motorboats cruising back and forth past their old barn silos sticking forlornly up from the shallow reservoir in the middle of the project area, the bitterness does not blunt much with time. But it is important to understand that in no other nation in the world could a little band of citizens so lacking in money, political power, and tenure, have been able to raise their issue to the highest levels of government.⁶⁵ And we learned a lot.

Why hadn't environmental law prepared us for politics? In the course of our six years in Washington my students and I learned a lot we had not known, but it was bemusing to realize how naïve we were when we arrived. I had studied environmental law with the best, and yet our coping with the practical politics of everyday

65. On the other hand it could more lugubriously be noted that in no modern industrial democracy besides the USA, probably, could a contested case once brought to such a high level of official process, with such a decisive public record of the proposed project's dysfunctional diseconomies, nevertheless ultimately be overridden so cavalierly by legislative sleight of hand in a callow uncomprehending media climate mired in infotainment.

practice in government, and our sense of where it all fit, was based on shot-in-the-dark guesswork, sage advice on the spot from a disparate range of volunteer mentors, and a pastiche of 1960s impressions drawn from people ranging from Nixon and Nader to Abbey and Dylan.

One cannot expect environmental law training to produce advocates ready to cope with the full sophistication of Capitol Hill politics in state and national government. But we could prepare our students to recognize the underlying structures and phenomena. They could understand the existence of political realities that we needed to know—the shadowy dons of the appropriations process and the pork barrel, the mass of extraneous suasions and deterrents to agency action, the importance of having spooks on the inside, lobbyists, the political leverage of subcommittee chairs, the GAO, the fact that civic merits do not necessarily determine governmental outcomes, the extraordinarily decisive potential power of the media to shape public opinion and the impression of what public opinion will be, iron triangles, outsiders and insiders, the functional omnipresence of the marketplace Establishment—all these and dozens more were revelations we had to discover and learn to handle by luck, happenstance, or bitter experience.

Why do we teachers so often avoid directly addressing these realities despite the fact that we understand their functional importance? In part it may be that we think it important to separate law from politics for the sake of our aspirations for a society ruled by principles rather than human whim. As Bruce Ackerman anguished in another setting, “my entire academic career . . . has been one long struggle against the view that law is just politics.” To acknowledge the politics in law risks a “renaissance of legal nihilism in our nation’s law schools, which will slowly erode general confidence in the system.”⁶⁶ We fear that by talking about the hulking reality of politics we will obscure the fragile vine of the evolving pretensions of the rule of law in our field. So we pretend that the Emperor is wearing clothes. We shy away from teaching the hurly-burly of practical politics, perhaps, because we regard it as difficult to do and not at all a high calling. In many law school settings, moreover, we seem reluctant even to teach policy and theories of government, perhaps flinching from predictable accusations of political correctness. Universities are the

66. See Bruce Ackerman, *The Court Packs Itself*, 12 AM. PROSPECT 3 (Feb 12, 2001), available at <http://www.prospect.org/print/V12/3/ackerman-b.html> (a despairing plaint after analyzing *Bush v. Gore*).

place where such explorations must be undertaken, for where else will they be done?, but we mostly leave them to the political science departments. We want to avoid the criticism that the legal academy represents a skewed partisan alignment. Like the League of Conservation Voters (LCV) we confront a field which in elective reality has quite a clear partisan division. The LCV nurtures and cherishes its opportunities to support environmentally progressive Republicans because the LCV's annual legislative scorecards show so few members of the GOP at the environmental-protection end of the spectrum. Where the congressional GOP typically has scores averaging less than 20%, and its leadership close to 0%, the Democrat's average is above 80%, with its leaders at 83%.⁶⁷

And then there is the Cassandra syndrome. We are like the sad daughter of Troy's King Priam who was cursed with seeing the truth, but none would believe her when she foresaw danger for her *polis* lying within the belly of the huge horse on wheels. Many of us in environmental law, a field that so vividly illuminates large systemic issues, do not relish the foreseeable prospect of being regarded as chronic dismalists if we repeatedly point to the systemic shortcomings of our society's central institutions. Better just to focus on structures and doctrine.

But there is a real need for us to try. From a more articulated integration of political considerations, macro and micro, would come not cynicism but a broader and more realistic recognition of the structures and challenges with which we and our students must live and work—including the chess game of daily governmental life, human nature in all its rich complexity, environmental citizenship and the role of an informed and engaged citizenry, the Press's critical role as public information system and forum for policy debates, the systemic importance of campaign finance reform, opportunities for encouraging the corporate responsibility

67. In the 2001 League of Conservation Voters' Scorecard, for example, Democrats in the Senate averaged 82% and Republicans 9%; Democrats in the House averaged 81% and Republicans 16%. The senior Democratic leadership averaged 84% in the Senate and 83% in the House; the senior GOP leaders averaged 0% in the Senate and 0% in the House. The highest GOP legislator was Rep. Connie Morella of Maryland with a 93%. There were 72 Democrats with scores of 100%. There were 128 Republicans, no Democrats, with scores of 0%. LEAGUE OF CONSERVATION VOTERS, 2001 NATIONAL ENVIRONMENTAL SCORECARD 6, 8-10 (2002) (copy on file with Pace Environmental Law Review). This fascinating annotated statistical abstract is available annually at www.lcv.org.

movement, the virtues of transparency (a term many of our students have never even heard), and so on.

How to integrate a practical perspective on politics into the teaching of environmental law? That's a conference topic in itself. There are promising ways to open up the way we teach the field. Beyond the judicious use of instructive legal war stories, many of us have been discovering the creative utility of using complex simulations of environmental regulatory problems as a practical way to open our students' eyes to the intertwined realities of environmental law and politics. Negotiation role-playing, field trips to real life controversies, case study practicums. The talking-head model of law teaching is long past due for an overhaul, and on that path the realities of environmental law practice will tend to give the recognition of daily politics a legitimate place in the next generation of environmental law teaching. For starters, it would be good to get the phenomenon out on the table.⁶⁸

III. Stepping Back: An Overview of Societal Governance

The Four, Five, or Six Branches of National Government

In the course of the six years of our fish-dam campaign, just as we learned that the practical workings of government were permeated with political processes to a degree we had not previously appreciated, we also came to view the overall structure of government in a very different light.⁶⁹

68. I diffidently note that ours is the only environmental law casebook that straightforwardly addresses the central relevance of understanding the "contending forces" in the political sphere around an issue, and directly states its bias (for transparency and citizen participation) from the beginning. See PLATER ET AL, *NATURE, LAW & SOCIETY*, *supra* note 29, at xxxvii, 29-32, 88-89.

69. Our multi-branch analysis and the need for more sophisticated civics awareness both are echoed in a recent Boston Globe op-ed piece:

In the old days . . . students learned how a bill became a law (a description that bore almost no resemblance to the way it really happens) . . . and the three branches of governing (leaving out two other important Washington power centers, the interest group and the media). No matter. Civics is on its way back . . . In truth, civics education may be an idea whose time has come (again), and it may be a topic that, after the Sept. 11 terrorist attacks, is welcomed by liberals and conservatives, regardless of their views on the role of government in American life . . . "The democratic process requires knowledgeable citizens who can read and write, but also be active," says [State Senator Richard T. Moore], who also serves as president of the Massachusetts chapter of the American Society for Public Administration. "Without them, it doesn't work. Without them, only a select few play a role in government. Without them, the squeaky wheels will have power, but the ordinary citizens won't." . . . It used to be implied that everyone had large citizenship responsibilities

The judiciary, the presidency. Which branch of government, for instance, is dominant? Arriving in Washington we knew it was not the courts. The judicial branch was crucial to our effort but clearly had only an adjunct role in finalizing this and most public policy issues, especially those lacking a clear constitutional question. We initially assumed that the President was the power center, and when we gained contacts within the Carter White House staff we thought that a decisive corner had been turned. Long before the whimpering denouement of the apologetic phone call from Air Force One, however, we had discovered that a President has only such political power as he can pull together issue by issue. Momentum helps, and neither the Ford nor the Carter presidency ever had much of that, but in any presidency it seemed to us there is little a President can count on accomplishing by bare fiat.

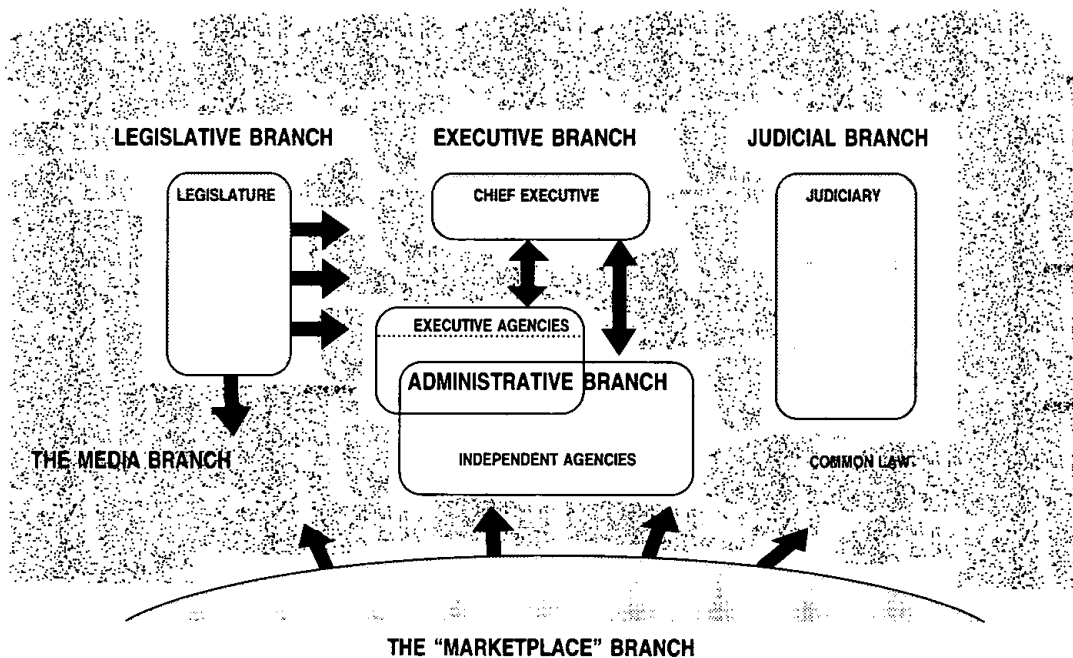


CHART ONE: THE 5 OR 6 FUNCTIONAL BRANCHES
OF GOVERNMENT⁷⁰

and should be participating," [says Richard Niemi, A University of Rochester political scientist]. "Maybe we've gone overboard by trying not to preach. We're at a different extreme now. We have to get back to balance."

David M. Shribman, *Bush's Civics Proposal May Provide Students with First Case Study*, BOSTON GLOBE, May 14, 2002, at A3.

70. As noted in the impressionistic analysis presented in the text of this essay, the "executive" branch practically can be divided into "Schedule C" agency officials who are political appointees serving at the pleasure of the chief executive, and the vast majority who are Civil Service employees serving despite Administration changes, the

The executive branch, the administrative branch. As Chart One implies, in functional terms the President is not even in charge of all that is typically referred to as “the executive branch.” Just consider the name of the office—merely the “preside-ent.” The President does control his personal staff and the men and women who serve at his pleasure at the very top ranks of Cabinet and other dependent agencies, and he retains substantial budget power, although far less than formerly. The vast majority of the federal government, however, should more properly be referred to as “the administrative branch.” Independent agencies like TVA and many others are only casually under his authority, their leaders appointed for fixed terms, thereafter dismissible only for proven incompetence or moral turpitude, and their budgets are now determined by Congress as much as the White House.⁷¹ But even within the Cabinet agencies themselves we realized that the vast bulk of agency staffers, as Civil Service employees, were likewise scarcely dismissible, and that the agencies had ponderous internal cultures that plowed along irrespective of changes in administration. The degree to which a President’s political appointees in Cabinet agency leadership positions made a difference seemed to correspond to how well they as individuals fit each agency’s internal culture as it existed in the administrative branch. Due to iron triangles and in some cases outright capture, agencies like the Federal Energy Regulatory Commission (FERC) or particular divisions like the Forest Service in the Department

“administrative” branch. As argued in the text, two further powerful “branches” are the Fourth Estate, the Media, and the political-economic Marketplace, which may be the most dominant branch of all. Chart assistance credit: Joan Shear.

71. In 1974, responding to many Members’ displeasure with Richard Nixon’s attempts to impound appropriations for several programs he did not favor, especially highway and environmental programs, and the fact that Presidents effectively monopolized most of the budget-formulating process, Congress enacted the Congressional Budget and Impoundment Control Act of 1974. 88 Stat. 320 (effective July 12, 1974) (codified at 2 U.S.C. § 680 (1997)). The Act grew out of a 1967 report by Lyndon Baines Johnson’s Presidential Commission on Budget Concepts that appeared only shortly before LBJ left office so Johnson never had to face the shift of power down Pennsylvania Avenue that the reforms accomplished. The 1974 Act established procedures for Congress to develop its own draft annual congressional budget. It created the expert Congressional Budget Office (CBO) and standing committees in both chambers devoted solely to the Budget. These committees and the CBO then established strategic technological parity with the President by purchasing their own computer, a prosaic act that some would say had constitutional consequences. See Congressional Budget and Impoundment Control Act, 2 U.S.C. § 680 (1997), as amended. For background see also BENJAMIN GINSBERG & MARTIN SHEFTER, *POLITICS BY OTHER MEANS: POLITICIANS, PROSECUTORS, AND THE PRESS FROM WATERGATE TO WHITEWATER* (W.W. Norton ed., 1999).

of Agriculture, both of which were unenthusiastic about the ESA, might well be more aligned with the industries with which they worked than with the President, especially a reform-minded President who wished to change the agency's fundamental course.

The congressional branch. So, adding the legislature, that makes four branches of government, and of these four Congress clearly seems to be pre-eminent. The political chips a President has to pull together to build a prevailing position on an issue are primarily tied to Congress. If Congress cuts appropriations, refuses to vote a desired bill out of committee, threatens awkward hearings, or makes any of many other moves in its arsenal, executive initiatives can be stalled in their tracks. Since the departure of LBJ and the arrival of the congressional Budget Committees with their own budget-drafting computers,⁷² the White House's presumption of pre-eminence has disappeared. If the calculus of Washington is built on power, and power is based on how much a player can hurt or help you, then it appeared to us that Congress, especially in its senior members, is courted and feared the most.

The Media branch of government. But we discovered that Congress itself courted and feared yet another structure of the political process that apparently could wield sharper peremptory power even than they. It's the Press. Although we were never privileged to receive the kind of incisive journalistic coverage that could have changed our fortunes in the legislative process, we were repeatedly amazed by how reporters on other issues were treated as fearsome potentates, and how a series of dramatic and revealing press stories could quickly change the tone and outcome of a public policy debate.

The Press is so important and so potent a part of the governance process that it too deserves recognition as a branch of government, and that makes five. On Chart One the Media Branch is denoted by the fog-like presence drifting around the other branches, omnipresent, thought to be daily shaping and embodying the public opinion of the nation, providing a major part of the informational grist upon which the other branches (perhaps even the courts) base their actions, erratic, but always ready to condense in sudden stormclouds of focused coverage.

The Marketplace branch of government. But, we ultimately decided, there is another branch of national government more omni-

72. See generally note 71 on Congressional Budget and Impoundment Control Act of 1974.

present and powerful than these five. It's what we came to think of as the political-economic "Marketplace." The marketplace has arguably always been the most powerful "government" of American life. It can be argued that the marketplace economy was in fact the true driving force of the Revolution that cut us off from colonial rule and set us off on our manifest destiny march of conquest across the continent. The Thirteen Colonies had matured as a separate market entity and so "like ripe fruit" they dropped away from Great Britain. Still today the marketplace is far more powerful than any other in governing the daily life of the nation, intimately shaping the lives of each of us, supplying or withholding an array of goods, services, and behavioral options. The press, which we saw wielding such power over the players of government, is still, when you get down to it, part of the marketplace in the business of selling news and infotainment.

Wherever we went in Washington we found the organs of government responding with instinctive attention to the marketplace interests and coalitions involved in each issue. Interior understandably flinched when it realized that the ESA would throw it into confrontation with the marketplace coalition of economic and political forces that was the Tenn-Tom pork barrel. Interior, like other departments, instinctively responded in all its various sub-departments to the array of industry networks it connected with—mining, grazing, water supply, oil and gas, transportation, power, irrigation, timber, pulp and paper, fishing, homebuilding, urban construction, and many more, many of which were in the parade of witnesses from industry and commerce who appeared in congressional hearings and corridors lobbying on the ESA.

In the iron triangles we observed throughout government, from Southeastern water projects to national forest timber cutting in the Pacific Northwest, it appeared to us that the marketplace element of the triad was dominant. The agency was the vehicle for federal participation in construction or subsidies, and the congressional sponsors were critically important in obtaining project and program authorizations and appropriations. But the engine that drove both was the linkage to the marketplace players outside government that generate payrolls, campaign contributions, local and national economic activity, vote-enhancing public relations. The marketplace economy seemed to us a powerful latent presence, the mass and momentum of which undergirded and affected most of the daily business of the official entities of government. The federal government may be a tiger (and we often felt

like a mere flea on that tiger), but we decided the tiger was riding, with its claws mostly sheathed, atop a lumbering elephant.

By thinking of government through the expanded rubric of six branches we could make more sense of the processes and players that we encountered over our six years in Washington. In our case we had to operate in all six branches, but in doing so it was important to have an orienting sense of the interactions, of what each could and could not do, of where power lay and how to address it.

Beyond the Multiple Branches of Government: A Societal Construct of Three Economies

The assertion that social governance proceeds in six different "branches," however, does not provide a conceptual construct of the political whole sufficient to explain the place of environmental law. To make that further step, I invite consideration of a model used with my students for several years, built upon the idea of an "economy of nature" floated by Joe Sax in 1993.⁷³ For better or worse it seems appropriate to seek a holistic societal construct within the rubric of "economics" rather than "law," and the hypothesis I am asserting is that we live in not just one economy, but simultaneously in three.

The marketplace economy. The construct begins with the huge compound mechanism that most people primarily are thinking of when they speak of "the economy." Let's call it the "marketplace economy," and by that phrase I do not mean just the world of business, but the vast behavioral system beloved of the Chicago School comprised of millions of individualized daily decisions of corporate and individual actors, private and public entities. The marketplace economy is the dominant structure of human and governmental actions, an immensely powerful network of networks, a system of interconnecting systems. It makes sense, in Chart Two, to picture the marketplace as the central figure, dominating the daily life of the three economies' societal cosmology. The interconnecting rings within it represent the dynamic energy of its net-

73. See Joseph Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1445 (1993); see also Zygmunt J.B. Plater, *Environmental Law and the Three Economies: Navigating a Sprawling Field of Study, Practice, and Societal Governance in which Everything is Connected to Everything Else*, 23 HARV. ENVTL. L. REV. 359 (1999); Zygmunt J.B. Plater, *The Three Economies: An Essay in Honor of Joseph Sax*, 25 ECOLOGY L.Q. 411 (1998).

works of interconnecting systems, and not coincidentally echo the international logo for a nuclear fission reaction.

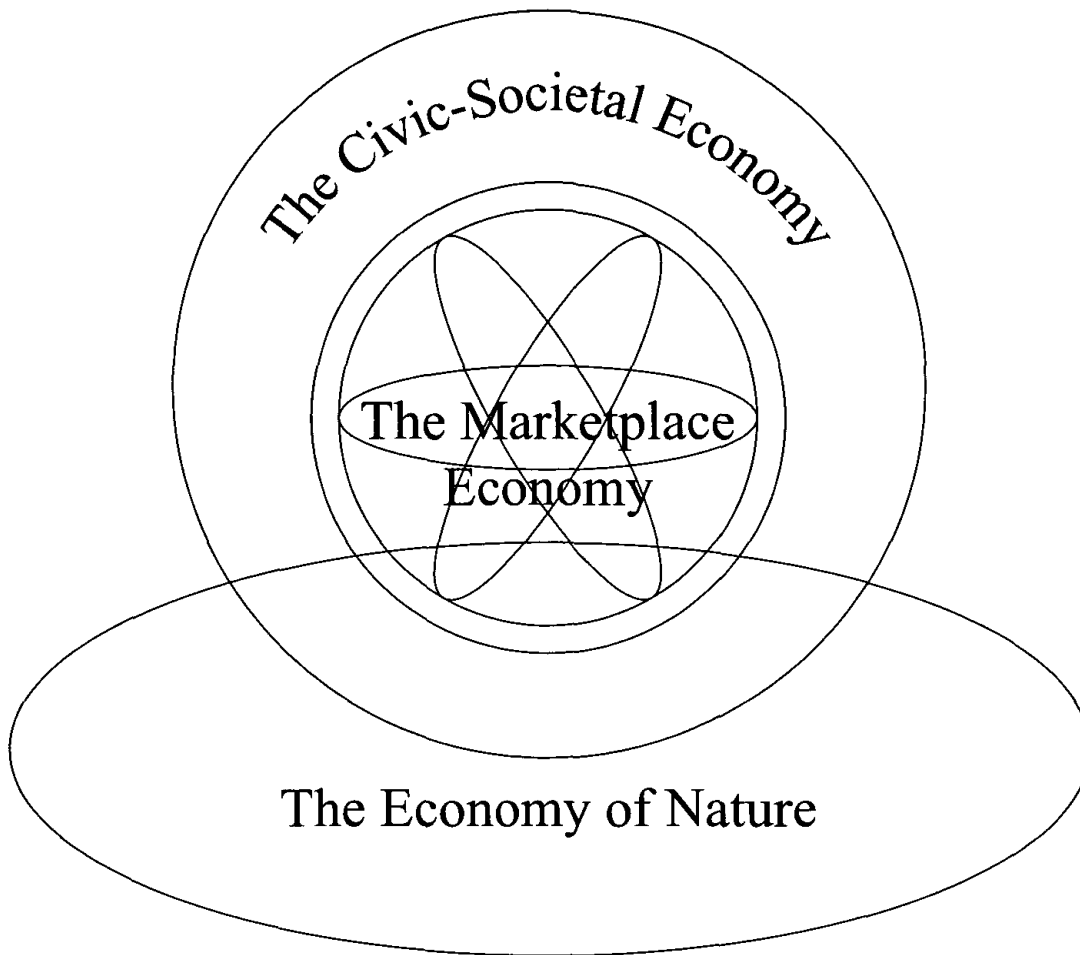


CHART TWO: THE THREE ECONOMIES⁷⁴

The marketplace economy is the most powerful, intimate, highly articulated, self-energizing human system ever invented, probably including religion. Public agencies as well as corporations are major integral components of the market economy, as TVA and many other federal actors demonstrate. It is naïve to

74. Another impressionistic illustration. As noted in the text of the essay, it requires three intersecting economies to accomplish a fully realistic economic analysis of most issues of environmental law. The Marketplace Economy is the dominating dynamo of the society, at least in the short term, dealing with everything that can be reduced to market pricing and its equivalents, and traded. The Marketplace takes in resources and other inputs from the Economy of Nature and the Civic-Societal Economy, and directly or indirectly passes its excesses and negative externalizations back into the other two economies. Government and law are interposed as a protective buffer around the Marketplace, with varying degrees of effectiveness, to protect people, culture, Nature, and other diffuse values from "market failure" situations where the Marketplace Economy undercuts or insufficiently serves societal welfare.

think of any major sector of the marketplace economy, for instance energy, without thoroughly incorporating the internal dynamics of iron triangles and agencies like Department of Energy, the Bonneville Power Authority, TVA, FERC, Nuclear Regulatory Commission, state utility board politics, and so on.

The marketplace economy's elaborate synapses for brokering motivations and payoffs have built breathtaking wealth and technological power for modern society. But for all its dynamism, the marketplace economy has several tragic flaws. Every entity in the marketplace economy basically tends to deal only with things that have some form of price tag attached, where benefits or costs are registered and accountable, and each entity also shares the same tragic logic of cost externalization so well known by environmental lawyers, so that wherever possible each entity tends to externalize social costs out from the domain of the marketplace economy and into no-man's land. When combined in huge multiple networks, the effect of this inclination is to externalize vast amounts of pollution and other disruptive costs into the natural economy and beyond. Absent a regulatory environmental accounting, pollution goes into the air and the nearest water bodies. Rivers, valleys, forests and farms are officially regarded as cheap and handy materials for supporting make-work pork barrel projects that allow iron triangles to remain potent.

The economy of nature. If you are going to conceptualize "economics" as a major part of a society's self-governance, it makes sense to posit and picture—in addition to the dynamic, interconnected mechanisms of the marketplace economy—an "economy of nature" as well, a separate economy representing the physical context upon which the marketplace is built, where resources come from and where many of the market's externalized costs go.

An economy of nature really does exist. Like the marketplace economy, it is a complex system of systems, even more intricately connected and complex than the marketplace economy in the way it processes the elements and forces within and imposed upon it, brokering and buffering inputs and disruptions through its cycles of water, carbon, energy, and interconnecting ecosystem functions. The marketplace economy takes resources and services from the economy of nature, and sends back to it pollution, resource derogation, and disrupted ecosystem dynamics. The economy of nature gives and takes, and is forced to adjust as best it can.

But natural resources and services have hugely significant value even if they are unacknowledged or undervalued by the

marketplace. Robert Costanza and his colleagues have analyzed the multi-trillion dollar values of "natural capital," the resources and services provided free or far below their true value, without which the marketplace and human life would be impossible.⁷⁵

And the costs that are externalized from the marketplace economy do in fact go somewhere. The ultimate reality is that everything has consequences. Many externalized negatives are passed back into the economy of nature with critically significant consequences to natural systems—pesticides shutting down bacterial soil-building, ecological disruptions from human-caused climate change, loss of forests, wetlands, prairie. The costs impacted into the economy of nature do not just disappear out of sight out of mind. Nature is not a sink. A river that isn't there anymore isn't there anymore.

The civic-societal economy. But a construct of just two economies—with the economy of nature added to the familiar marketplace economy—does not adequately capture the full range of societal dynamics, values, and externalized costs that launched environmental law in the first place. Environmental law did not begin exclusively nor primarily as a defense of nature. The images that launched the environmental law revolution in the 1960s were of pollution directly impinging upon human health. Where, in the construct of two economies, do the utilitarian human consequences of the marketplace economy get represented? Asserting the existence of an economy of nature is not sufficiently persuasive to prod politicians and others deeply entrenched in the blandishments of the marketplace economy to broaden their perspectives. Our political players are likely to regard this "economy of nature" as an intangible, insubstantial academic figure of speech that does not impinge on the daily economic

75. Robert Costanza and Herman Daly have led the Natural Capital analysis, and come up with impressive numbers:

We have estimated the current economic value of 17 ecosystem services for 16 biomes, based on published studies and a few original calculations. For the entire biosphere, the value (most of which is outside the market) is estimated to be in the range of US\$16-54 trillion per year. . . . Because of the nature of the uncertainties, this must be considered a minimum estimate. Global gross national product total is around \$18 trillion per year.

Costanza et al., *The Value of the World's Ecosystem Services and Natural Capital*, 387 NATURE 253 (May 15, 1997); see also PAUL HAWKEN ET AL., NATURAL CAPITALISM: THE COMING EFFICIENCY REVOLUTION (1998); Robert Costanza & Herman Daly, *Natural Capital and Sustainable Development*, 6 CONS. BIO. 37-46 (1992); Paul Hawken, *Natural Capitalism*, MOTHER JONES, Mar.-Apr. 1997, at 40.

and political realities in which they live. If you talk about the "natural economy" you sound like a tree-hugger.

So we need to picture a third concurrent economy, incorporating elements outside the marketplace economy, like the economy of nature, but representing a universe of more direct human utilitarian self-interests. I would unpoetically call this the "civic-societal economy." Externalized costs that are passed out of the marketplace into nature often simultaneously or subsequently pass on directly or indirectly into the interconnected networks of a human societal economy as well. This occurs with industrial pollution, some of which goes directly into humans' bodies. Workers, for instance, have absorbed dangerous levels of solvents into their blood and endocrine systems while working in unregulated factories,⁷⁶ and a host of other largely unaccounted human social costs also occur when such solvents are dumped in a river killing or altering a hundred kinds of plant and animal life forms, cutting back on fishing harvests and recreation, lowering property values, changing human qualities of life in terms of aesthetics, health, and collateral economics. The civic-societal economy represents human values and quality of life that the marketplace does not adequately value—a stable, secure low income mixed neighborhood, a sunset, a fishable swimmable watercourse, the cultural richness of communities and places. In the Tellico Dam case, going beyond the economy of nature, shouldn't one be able to consider the civic human value of a family farm community that had been settled here for 200 years? And the societal value of the region's last stretch of big, clean flowing river, the nation's oldest continuously-inhabited locale with 10,000 years of prehistory, the ancient heart of the Cherokee nation, a blue ribbon trout river turned to dross, the moral reverberations of consciously consigning a rich, unique ecosystem to extinction?

When you chart the dynamics of all three economies you find them deeply interconnected, with all three necessary to a realistic description of how our society functions in its natural context. Nature is not "outside" our human economy or our jurisprudence.⁷⁷

76. The Allied Kepone case is the classic example that helped launch the federal water pollution control act amendments. See PLATER ET AL., *NATURE, LAW & SOCIETY*, *supra* note 29 at, 39-54.

77. Professor David Westbrook has expressed some frustration at the difficulty of defining a coherent philosophy of environmental jurisprudence. He tried to build a liberal conceptual overview upon the perspectives of individual human rights, collective aggregated rights, and markets, but was unable to fit some sectors of environmental law into those realms. Norms protecting endangered species, for instance,

Human social dynamics and civic values are not reducible to marketized balance sheets. Thus if you are an economist purporting to tell the nation how it should make production and governance decisions, you are naïve or a crook if you do not consider costs and benefits within all three economies. You cannot rationally decide how to produce and apply a chemical, propose to clear-cut federal subalpine forests, mine a mountain, pass a fast-track agreement exalting global trade, or build a dam, without weighing the consequences in all three economies.

Where is government in the three economies? Theoretically, of course, our legal system periodically recognizes the importance of the second and third economies. Statutes and regulatory systems are primarily created to correct private and public failures in the marketplace economy—addressing the marketplace’s dysfunctional impacts upon the other two spheres. Schematically, then, we can best conceive of government as strategically positioned around the perimeter of the marketplace economy, looking in. Although much of government is created to facilitate the functioning of the marketplace, the core objective of most regulatory entities, programs, and societally protective statutes, including most in the environmental field, is to attempt to mitigate and control the excesses of the marketplace. Thou shalt not throw carcinogenic chemicals into the natural environment, nor destroy forests or wetlands unless you can substantially recreate them, nor expose vulnerable populations to substances that pose metabolic hazards,

seemed to come from an alien, less human-centered domain. *See generally* David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619 (1994). As he has commented:

Most of our law may be (must be) articulable in some liberal language. But the Endangered Species Act cannot be, not really. . . . At some point liberalism’s concern for the internal (autonomy, choice), fails to capture environmentalism’s sense of the external (ecosystems, nature, etc.). At the end of the day, you cannot explain the outside in terms of the inside.” Posting of e-mail message from dwestbro@acsu.buffalo.edu to envlaw-profs@darkwing.uoregon.edu (Nov. 6, 2001) (Copy on file with Pace Environmental Law Review.).

Conceptualizing the existence of three interlinked economies, however, helps to clarify that environmental jurisprudence operates on the realistic foundation that there *is* no external outside. Environmental law’s high purpose and aspiration is to make sense of the First Law of Ecology, that everything is connected to everything else. Environmental law, like all law, ultimately must function in the real world, a world made up of multiple interlocking systems. We humans individually and collectively are indeed significant components of many of these multiple systems. But we are not hermetically set apart from the systemic elements and networks that do not operate on our own terms, just as we are not disconnected from the consequences of our own actions.

nor tear down the cultural treasures of the past for insubstantial short-term reasons.

Carbon control rods, and the processes that erode them. If nuclear fission is a workable metaphor for the powerful interconnections, reactions, and drive of the marketplace economy, as suggested in Chart Two, then perhaps government statutes and regulatory programs should be conceived of as a system of carbon control rods, civic constraint mechanisms consciously inserted from the perimeter into the midst of the marketplace sphere in which the potentially cataclysmic phenomena reside, in order to moderate and control the powerful systems' destructive tendency to run wild. In environmental law and elsewhere, agencies and statutory programs typically are legislatively created and imposed upon the marketplace in moments of vividly perceived market failures, to correct them for the future. Disasters to humans and to nature like Love Canal, the Kepone incident, the Exxon-Valdez oil spill, and whooping cranes on the verge of extinction create momentary transparency for marketplace situations otherwise obscured from public recognition, and from them we get statutes like the Comprehensive Environmental Resource Conservation and Liability Act, Resource Conservation and Recovery Act, a strengthened Clean Water Act, Oil Protection Act of 1990, and the Endangered Species Act.

But the metaphor goes further. From the moment they are inserted, control rods are embattled by the very forces that required their imposition, and, unless they are maintained, strengthened, and renewed, over time they tend to deteriorate. When the moments of vivid public concern that created them dim into retrospect, civic enactments coming from outside the marketplace economy lose some of their sustaining force. When the generative civic moment passes, the daily realities of the iron triangles and marketplace forces that created the problems necessitating civic controls in the first place begin to erode the control mechanisms. Consider the sad, real-world record of governmental regulation of mining, logging, overgrazing, overfishing, chemicals in our food chains, and at how the ESA's protections for the last natural population of our endangered fish were erased by the Tellico Dam.

The politics of resistance against civic regulation. Observing the political reaction that rallied against the snail darter injunction, we came to see it within the context of a much larger process of resistance to governmental regulation. Understandably, major

players within the marketplace economy coordinate and interlink themselves into networks of lobbies, trade organizations, and other coalitions designed to promote and protect the self-interest of their industries. A broad resistance to the imposition of external regulatory controls is a natural inclination, and from it a widespread national anti-regulatory movement has resurged in the past twenty-five years. The breadth of reaction revealed in the ESA hearings included lobbying and testimony from the National Association of Manufacturers, the Business Roundtable, the Pacific Legal Foundation, the homebuilding industry, Edison Electric Institute, Chemical Manufacturers Association, ranching, mining, corporate agriculture, pulp and paper industries, and many more.

The tone of the political debate often cast the snail darter as a representative of much more than the endangered species issue. It was an opportunity to trivialize and undercut regulatory government in general. Direct attacks on air or water pollution statutes can be politically dangerous. The images that then come to the public's mind are of vulnerable humans choking for breath or drinking water sources choked with sludge and dead fish. But the images summoned by endangered species protection, on the other hand, do not evoke the same depth of human concern. The ESA is broadly supported by the public, Senator Baker's aide admitted to us, but, he smiled, "although it may be a mile wide it's only an inch deep." If he and his allies could depict endangered species as conflicting with human welfare, the public would come to realize that this and other environmental regulations were too severe.

Viewing the politics of environmental law through the perspective of the snail darter and the three economies suggests a spectrum of different processes by which the marketplace operates in all the branches of government and national life to resist the imposition of various civic-societal regulations. Iron triangles, agency capture, media and public opinion campaigns, agenda-driven judicial appointments, the creation of industry-oriented "public interest law firms" and academic foundations,⁷⁸ a well-

78. Lewis Powell prepared a memorandum for the U.S. Chamber of Commerce shortly before he went onto the Supreme Court. In it, he decried the creeping socialism dominating America, as exemplified by civil rights, consumerism, and environmentalism, and he called for business to begin funding academic and representational programs and foundations to counteract the 1960s ideologies in American society. The Powell Memorandum led directly to the founding of the Heritage Foundation and other similar initiatives. See Memorandum from Lewis F. Powell, Jr., to the U.S. Chamber of Commerce, *Attack On American Free Enterprise System* (August 23,

funded "Wise Use" movement, regulatory erosions argued as necessary for global trade. Anti-regulatory initiatives can be tracked in such disparate settings as national environmental education association conventions⁷⁹ and industry-funded Montana junkets providing more than forty percent of the nation's federal judges with week-long free vacation resort seminars on how the ESA and other environmental statutes are economically unwise and unconstitutional.⁸⁰

In the judicial context, the marketplace anti-regulatory agenda can be tracked in the evolving jurisprudence of the federal judiciary as it has been reshaped over the past twenty years beginning with the Meese-Sununu years of judicial appointments.⁸¹ In the legal process context, generally there are five sectors of political initiative that have been deployed with varying success over time to undercut regulatory effectiveness. Cutting back on citizen enforcement is one important strategy, as the Supreme Court's current majority has sought increasing limits on citizen standing, and agencies and Congress craft procedures where discretion reigns and clear-cut violations are harder to establish.⁸² Doc-

1971) (Copy on file with Pace Environmental Law Review.). See also Oliver Houck, *With Charity for All*, 93 Yale L.J. 1415 (1984) (analyzing how industry has created and financed "public interest law firms" as "charitable organizations" to promote business interests against governmental regulation in the public interest). Law-and-economics professors have reportedly received funding amounting to tens of millions of dollars to develop the impressive current corpus of pro-business academic justifications for the dominance of marketplace dynamics.

79. See Thomas Harvey Holt, *Growing Up Green: Are Schools Turning Our Kids Into Eco-Activists?* REASON MAGAZINE, October 1991, at 37-40.

80. See Joe Stephens, *Judges' Free Trips Go Unreported*, WASHINGTON POST, Friday, June 30, 2000, A1; Ruth Marcus, *Issues Groups Fund Seminars For Judges*, WASHINGTON POST, Thursday, April 9, 1998, A1; COMMUNITY RIGHTS COUNSEL, NOTHING FOR FREE, HOW PRIVATE JUDICIAL SEMINARS ARE UNDERMINING ENVIRONMENTAL PROTECTIONS AND BREAKING THE PUBLIC'S TRUST (July 2000) at <http://www.tripsforjudges.org/crc.pdf> (last visited June 23, 2002) accessed through www.communityrights.org.

81. See generally William E. Kovacic, *The Reagan Judiciary and Environmental Policy: The Impact of Appointments to the Federal Courts of Appeals*, 18 B.C. ENVTL. AFF. L. REV. 669 (1991).

82. The *Laidlaw* decision in the Supreme Court is one of very few recent cases upholding citizen standing. The trend is overwhelmingly in the opposite direction. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167 (2000). See generally PLATER ET AL., *NATURE, LAW & SOCIETY*, *supra* note 29, at 398-418.

The five main sectors of current anti-regulatory legal initiatives are:

1—**Restricting Citizen Enforcement:** The post-'60s pluralism that built environmental law on the foundation of the civil rights, anti-war, and consumerist movements, likewise focused on citizen action and citizen law enforcement. If citizen enforcement is blocked, then many regulatory laws will be ineffective, and "Iron Tri-

angles"—made up of regulated industries, supportive legislators, and suborned agencies—can continue to dominate in the traditional insider-politics fashion. Severe constraints have increasingly been placed on citizen enforcement by legislative riders and judicial holdings, particularly in the area of standing to sue. The Supreme Court's 2000 *Laidlaw* decision somewhat abated the siege against citizen standing, though the 2001 *Sandoval* decision illustrates the continuing effort to constrain citizen suits. See *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000); *Alexander v. Sandoval*, 532 U.S. 275 (2001).

2—Devolution: Efforts in courts and legislatures to recapture regulatory powers from the federal government and recommit them back to the states. This effort has utilized a selective "federalist" argument picking up and going beyond earlier states' rights arguments targeting federal civil rights enforcement. It builds on the "divide-and-conquer," "race-to-the-bottom" political logic that if regulation of the marketplace is devolved to 50 different legal systems, the efficiency and impact of regulation overall will decline. Recent manifestations include Bush administration suggestions that determinations on required degrees of pollution control should be shifted back to the states that best know their own situations, and recent Supreme Court decisions like *Lopez*, *Morrison*, and *SWANCC* that cut back the scope of federal regulatory jurisdiction. See *United States v. Lopez*, 514 U.S., 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

On the other hand, when states are more protective of health and environment than the federal government, putative states' rights advocates may shift to pre-emption arguments. See *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88 (1992) (state hazardous waste occupational safety and health training standards impliedly preempted by OSHA); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (plaintiffs' tort claims impliedly preempted by the Food, Drug, and Cosmetic Act); *Cippilone v. Liggett Group*, 505 U.S. 504, 544 (1992) (Scalia dissent urging that all state tort claims for cigarette-induced injuries are impliedly preempted by federal statutes); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (holding that the Clean Water Act pre-empts Vermont's tort suit against a New York polluter's fouling of Vermont waters); *U.S. v. Locke*, 529 U.S. 89 (2000) (holding state restrictions on hazards of oil tanker spills preempted); *Rush Prudential v. Moran*, 122 S.Ct. 2151, 2171 (2002) (Rehnquist, Scalia, Thomas, and Kennedy dissenting against majority holding that federal statute does not pre-empt state health care patients' rights); see also E.J. Dionne, "Conservatives Use States' Rights as a Pretext," *NEWSDAY*, June 26, 2002 at page A29.

3—Delegation challenges: The "non-delegation" doctrine (arguing that a statutory delegation of power to an agency for a particular action is void because it was not done properly) is recurringly used, selectively, in judicial review attempts to curtail regulatory actions. The non-delegation doctrine has been used extensively in state judicial review of administrative actions, and had been repeatedly urged on the Supreme Court by Justice Rehnquist in certain environmental cases, starting with the *Benzene* regulation case in 1980. *Industrial Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (the "Benzene" case). The Court's 2001 *American Trucking* decision, however, backed away from asserting a heightened delegation standard for federal judicial reviews of administrative actions. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001). In some settings, however, the same forces that make statutory delegation challenges against strong federal agencies will advocate deference to the decision of agencies that see the regulatees' side of things.

4—"Re-inventing Government"—Applying Cost-Benefit-Risk analysis as a prescriptive standard for regulatory decisionmaking, (overriding the "P" Principles: The Precautionary and Polluter-Pays Principles): This initiative is reflected in attempts to establish "market-based regulation," market-oriented cost-ben-

trines of deference and devolution to the states undercut the federal matrix that built environmental law, although in selected cases where states regulate more stringently than the federal agencies, the strategy shifts 180° toward federal pre-emption of state regulations.⁸³ Reinvigorating the doctrines restricting the delegation of power to agencies is another strategy enforced selectively, alternating with the doctrine of deference to agency decisions in cases where agencies are more accommodating to marketplace requisites. Efforts to imply market-based cost-benefit-risk analyses as a prescriptive standard for regulatory decision making are a fourth strategy, incorporating an inherent bias in favor of costs that can be accounted in the marketplace economy and discounting values in the natural and civic spheres. Property rights and regulatory takings challenges constitute the fifth sector of anti-regulatory initiative, with the doctrine of inverse condemnation pushed to unprecedented extremes in attempts to chill and reverse environmental regulations that impose costs on the marketplace.

The anti-regulatory initiatives can be discerned throughout the different branches of government and public policy debate, and tends to color how we conceive of the proper role of government as a whole. At times, as during the Gingrich revolution of

efit formulas, and risk analysis as determinative procedures in setting and enforcing regulatory standards domestically and abroad. Although it has had powerful effect in many lower court decisions as well as national legislative policy, the Supreme Court's *American Trucking* decision backed away here too from asserting a fundamental legal role for cost-benefit-risk analysis.

5—Regulatory Takings Challenges: The constitutional claim that government regulation that “goes too far” in its impact upon private business enterprises will be void, or held to be compensable. The definition of the extent of private rights, of public rights, and of when a regulation goes “too far” is an intensely political process, in which private rights initiatives currently are strongly in the ascendancy. Uncertainty about how private property rights will be weighed serves to chill new regulation as well as encouraging state and local courts to broaden the scope of required compensation for existing regulations. The Court's *Palazzolo* and *Tahoe-Sierra* cases are the latest window into the judicial politics of regulatory takings. See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465 (2002).

83. Our credible modern environmental protection law grew through the leverage of “cooperative federalism” schemes providing uniform federal minimum regulatory standards, blocking the interstate race to the bottom. See PLATER ET AL., *NATURE, LAW & SOCIETY*, *supra* note 29, at 309-313. That the race to the bottom divide-and-conquer strategy is real, despite a good deal of recent wistful revisionist denial, one need only consider the core attempts in the 104th Contract with America Congress to neuter environmental law by shifting it back to the states. See generally DEAN MCSWEENEY & JOHN E. OWENS, *THE REPUBLICAN TAKEOVER OF CONGRESS* (St. Martin's Press, New York) (1998).

the 104th Congress or in many opinions expressed by Justice Scalia or Rush Limbaugh, government is depicted as a barely legitimate necessary evil, a junior partner to the marketplace.⁸⁴

I suggest that we need a re-conception of government as more than a supportive partnership with the marketplace, though partnership is fine as far as it goes. If government is neutralized as an effective long-term mechanism for asserting and implementing public values, however, then the power of the marketplace becomes unconstrained. It becomes a system where the impulses that have produced the crashes of some of the world's largest companies characterize the daily governance of the society. The marketplace economy resists the fences and carbon rods of government, but it necessitates them, or we will find ourselves less a nation state than a network of economic warlords. Current bulletins from Afghanistan show that is no prescription for a sustainable society. A system driven by essentially individual motivations without a concurrent societal ethic internalizing civic community principles is a recipe for disaster, environmentally and beyond.

Aristotle himself seems to have recognized this. In the *Politika*, I have been told, the classic phrase which is usually translated as "Man is a political animal" can also be read in Greek to say that "[A hu]man is an animal who lives within a *polis*." The *polis* was the Greek city-state, the aggregation of individual citizens in a communal relationship with shared civic rights and responsibilities that carried Athens to its democratic heights. If our modern society is to shepherd the extraordinary accomplishments

84. This perspective also casts doubt on some of the more extreme assertions about an era of government-industry partnership as a "third generation" of environmental law. By the 1980s it may be that the framework of federal pollution laws had generally become accepted by the marketplace, shaping internal industry planning and giving rise to the small but vital secondary sector of pollution control business. But how does one then explain the 104th Congress? The dramatic events of the Contract with America Congress in 1994 vividly demonstrated that the inherent instinct of the marketplace to unshackle itself and externalize social costs had not disappeared. Because industry was able to capture the House of Representatives, its Project Relief proceeded to push bills overturning a broad swath of protective environmental and social welfare laws. Species protection listings under the Endangered Species Act were subjected to a year-long statutory moratorium. Entrepreneurial human nature had not been reversed by years of industrial accommodation to environmental regulation. Had it not been for the bravery in particular of Republican Senator John Chafee of Rhode Island, Chair of the Senate Environment and Public Works Committee, many more corrosive statutes would have been passed in the 104th Congress, and we would not today recognize the landscape of environmental law. May he rest in peace. And if it recurred today, who would stand before the storm that might again be unleashed?

it has achieved to date, and enjoy a sustainable basis for maintaining and nurturing humans and their planetary environment over generations to come, then it must continue to be characterized by an Aristotelian recognition of the essential and legitimate role of civic government as well as the dynamism of individualized enterprise in the marketplace.

Coda. As I have demonstrated, it is easy to become grandiose and didactic in the attempt to define where environmental law fits into the societal cosmology. In more prosaic terms, however, we are left with the question of how to integrate political realities, structures, and contexts into the way we approach and teach environmental law. The enterprise is undoubtedly easier at the level of increasing our students' awareness of everyday practical politics. We should not hesitate to expose our students to practical simulations of complex regulatory cases and judiciously chosen war stories, scoping out the broad range of players and the different structures and networks in which they play. Such revealing glances and anecdotes can induce practical political savvy and sophistication in law students who too often still assume that the eighth grade civics book is a sufficient descriptor of the way environmental law and their own careers will function through the years.

On the grander scale, we all consciously or unconsciously formulate an internal construct by which we understand the components, functions, and structures of society and its governance. For better or worse this essay offers the suggested construct of a legal process and a system of governance functioning in the context of three interconnected economies uniquely well illuminated by the ongoing evolution of environmental law. Humans, corporations, markets, and the disparate segments and systems of the natural environment—these are not dissociated individual islands floating in a vacuum. They all exist in a web of direct and indirect interconnections, and environmental law in its focus on sustainability is the progressive conservative jurisprudence that takes on all of that as its territory.

Viewed from this perspective—a perspective shaped by our battles for the snail darter, the river, and the Endangered Species Act—the coming years of environmental law undoubtedly will continue to track the ongoing evolution of modern democracy.